15,225

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 209.

B. F. DOWELL, PLAINTIFF IN ERROR,

vs.

DANIEL W. APPLEGATE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED OCTOBER 1, 1890.

(14,196.)

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1 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plaintiff,
vs.
B. F. DOWELL, Defendant.

Suit in Equity to Determine Interest in Real Property.

Complaint.

Comes now the plaintiff, Daniel W. Applegate, and complains of the defendant, B. F. Dowell, and for his cause of suit against him alleges:

That the plaintiff is, and for a long time prior to the commencement of this suit has been, the owner in fee simple and in the possession of the following described land and premises, situate, lying, and being in Douglas county, State of Oregon, to wit:

Being a part of the donation land claim of Jesse Applegate, claim No. 38, notification No. 542, in township No. 22 south, of range five west, of the Willamette meridian. Beginning at the southwest corner of a tract of land sold by Wm. Henry H. Applegate to Charles Drain and John C. Drain, by deed dated June 24, 1871, and recorded in vol. 5, at page 383, of the record of deeds of Douglas county, Oregon; running thence south 31° 20′ west 7 chains and forty-three links; thence north 89° 15′ east sixty-three chains; thence north 31° 20′ east 7 chains and forty-three links; thence south 89° 15′ west sixty-three chains to the place of beginning, containing forty acres.

That the plaintiff derives his title to said lands and premises by purchase and claims under and by virtue of a deed of con-
2 veyance to him from William Henry H. Applegate and Nancy Elizabeth Applegate, his wife, executed and acknowledged on the 8th day of October, 1874, and which said deed of conveyance was duly recorded in the record of deeds of Douglas county, Oregon, on the 31st day of October, 1874, in volume No. 7, at page 124 of said record.

That the defendant claims to own an estate or interest in said land above described adverse to the title of this plaintiff, which he claims under and by virtue of a deed of conveyance to him from William B. Gilbert, the master in chancery of the circuit court of the United States for the district of Oregon, executed on the 6th day of December, 1883, and acknowledged on the 28th day of March, 1884, and recorded on the 19th day of August, 1884, in vol. No. 15, at pages 482, 483, 484, 485, 486, 487, 488 of said record, by virtue of a sale made in pursuance of a decree of said circuit court made and entered therein on the 5th day of January, 1883, in a cause therein pending, wherein B. F. Dowell was complainant and Jesse Applegate, Cynthia Ann Applegate, William Henry H. Applegate, Daniel W. Applegate, Charles Putnam Peter Applegate, James Fay, Charles Drain, John C. Drain, Jonas Ellensburg, and Alexander Applegate were defendants.

That the claim of the defendant casts a cloud upon the title of the plaintiff, and the said defendant threatens to, and will, unless he be restrained therefrom, enter upon and take the possession of said above-described land and premises from this plaintiff.

That the aforesaid conveyance of William B. Gilbert to the said defendant assumes upon its face to convey the said above-described land and premises to the said defendant. But plaintiff hereby alleges and shows that his said conveyance above referred to, from the said William Henry H. Applegate and his wife of said lands to the plaintiff, is prior in time to the commencement of the suit of the defendant against Jesse Applegate *et al.* above referred to, in which the aforesaid decree of the circuit court of the United States for the District of Oregon was rendered, in pursuance of which, said sale and conveyance was made by the said William B. Gilbert,
3 master in chancery, to the defendant, and that the validity of the said sale and deed of conveyance from the said William Henry H. Applegate and wife to this plaintiff was in no wise put in issue or determined by said decree.

Wherefore plaintiff prays the judgment and decree of the court that the claim of the defendant to said land be determined; that the defendant and all persons claiming through or under him be respectively enjoined from asserting said title against the title of the plaintiff to the lands described in this complaint.

That the cloud which it creates or casts upon the title of the plaintiff to the said land and premises be removed, and that the plaintiff recover a judgment for his costs and disbursements in this suit, and that a temporary injunction be issued restraining the defendant from in any manner interfering with the possession of the plaintiff to said land and premises pending this suit, or such other and further relief as to equity shall seem meet and proper.

C. BALL AND
C. B. WILCOX,
Attorneys for Plaintiff.

4 STATE OF OREGON, } ss:
County of Douglas, }

I, Daniel W. Applegate, being duly sworn, say that I am the plaintiff in the above-entitled suit; that I have read the foregoing complaint and I believe it to be true.

D. W. APPLEGATE.

Subscribed and sworn to before me this 17th day of August, 1886.

G. L. DIMICK,
[SEAL.] *Notary Public.*

5 [Endorsed:] In the Circuit Court of the State of Oregon for Douglas County. Daniel W. Applegate *vs.* B. F. Dowell. Complaint. Filed Aug. 17, 1886. T. R. Sheridan, co. clerk. C. Ball & C. B. Wilcox, Att'ys for Defendant.

Affidavit for Injunction.

6 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Pl'ff,
vs.
B. F. DOWELL, Def't.

Suit in Equity to Determine Interest in Real Property.

STATE OF OREGON, *County of Douglas.* } *ss:*

I, Daniel W. Applegate, being duly sworn, say that I am the plaintiff in the above-entitled suit. That I commenced said suit in the above-entitled court on the 17th day of August, 1886, by filing the complaint therein and causing a summons to be issued thereon.

That I have a good cause of suit against said defendant, B. F. Dowell, to determine his interest in the following-described real estate, to wit:

Being a part of the Jesse Applegate donation land claim, No. 38, notification No. 542, in township No. 22 south, of range 5 west, of the Willamette meridian.

Beginning at the southwest corner of a tract of land sold by William Henry H. Applegate to Charles Drain and John C. Drain, by deed dated June 24th, 1871, and recorded in vol. 5, page 383, of the records of deeds of Douglas county, Oregon, running thence south 31° 21′ west seven chains and forty-three links; thence north 89° 15′ east 63 chains; thence north 31° 20′ east seven chains and forty-three links; thence south 89° 15′ west 63 chains to the place of beginning, containing 40 acres as set forth in the said com-
7 plaint, and to have him enjoined from asserting said titles or in any manner interfering with the title or possession of the plaintiff in said land and to have the cloud, which the claim of the defendant casts upon the title of the plaintiff to said land, removed.

That the defendant has threatened that he will enter upon the said described land and take the possession thereof from the plaintiff.

That the plaintiff is informed and believes that the defendant will enter upon said premises and take possession thereof from the plaintiff unless he be restrained and enjoined from doing so.

That should the defendant be permitted to enter upon and take the possession of said land and premises from the plaintiff pending this suit, it would greatly prejudice the rights of the plaintiff in said suit and tend to render the decree ineffectual.

Wherefore plaintiff prays that a temporary injunction issue restraining the defendant from entering upon or taking the possession of said lands, or from in any manner interfering or attempting to interfere with the possession of the plaintiff pending the hearing of this suit and the final determination thereof.

D. W. APPLEGATE.

Subscribed and sworn to before me this 17th day of August, 1886.

G. L. DIMICK,
[SEAL.] *Notary Public.*

8 Endorsed: Affidavit for injunction. Filed Aug. 18, 1886. T. R. Sheridan, co. clerk.

9 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plff, *vs.* B. F. DOWELL, Defendant. } Suit in Equity to Determine Interest in Real Property.

Undertaking for Injunction.

Know all men by these presents that whereas the above-named plaintiff, D. W. Applegate, has made application to the county court of Douglas county, Oregon, for an injunction against the defendant, B. F. Dowell, in the above-mentioned suit:

Now, therefore, if the said injunction be granted by the said county court, we, D. W. Applegate, above named as principal, and George Haynes and G. J. Fuller, of Douglas county, Oregon, as sureties, undertake and agree to pay to B. F. Dowell, the above-named defendant, all costs and disbursements that may be decreed the defendant, and also all such damages, not exceeding the sum of three hundred dollars, as he may sustain by reason of the said injunction, if the same be wrongful or without sufficient cause.

Witness our hands and seals, at Roseburg, Aug. 18, 1886.

D. W. APPLEGATE. [SEAL.]
By C. B. WILCOX, *his Att'y.*
GEORGE HAYNES. [SEAL.]
G. J. FULLER. [SEAL.]

Witness:
C. B. WILCOX.

10 STATE OF OREGON, *Douglas County,* } *ss:*

I, George Haynes and G. J. Fuller, being duly sworn, say that I am a resident and freeholder of Douglas county, Oregon, and that I am worth the sum of three hundred dollars over and above all my just debts and liabilities and property by law exempt from seizure and sale on execution.

GEORGE HAYNES.
G. J. FULLER.

Subscribed and sworn to before me August 18, 1886.

C. B. WILCOX,
[SEAL.] *Notary Public.*

11 Endorsed: In the circuit court of the State of Oregon for *the* Douglas county. D. W. Applegate *vs.* B. F. Dowell. Undertaking. Filed Aug. 18th, 1886. T. R. Sheridan, co. clerk. C. Ball & C. B. Wilcox, attorneys for plaintiff.

12 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE
vs.
B. F. DOWELL. } Suit to Quiet Title and for an Injunction.

Motion to make Complaint more Definite.

The defendant moves the court to compel the plaintiff to make his complaint more definite, as follows:

1st. From whom did Wm. H. H. Applegate derive his title?

2d. What price did he pay for it, and in what was the payment made?

3d. What price and in what did the plaintiff pay Wm. H. H. Applegate for the 40 acres of land described in the complaint?

4th. And whether the plaintiff did or did not have notice of the Oregon State debt against Jesse Applegate prior to the purchase of the plaintiff from Wm. H. H. Applegate.

J. F. WATSON AND
B. F. DOWELL,
Att'ys for Defendant.

13 Endorsed: Circuit Court. Daniel W. Applegate *vs.* B. F. Dowell. Motion to make complaint more definite. Filed Sept. 7, 1886. T. R. Sheridan, co. clerk. J. F. Watson and B. F. Dowell, att'ys for def't.

14 Be it remembered that at a regular term of the circuit court of Douglas county, Oregon, begun and held in the court room at the court-house in Reesburg on Monday, Oct. 18, 1886, at which were present Hon. R. S. Bean, judge; J. W. Hamilton, dist. att'y; B. C. Agee, sheriff; T. R. Sheridan, clerk. Among other proceedings the following was had on Tuesday, Oct. 19, 1886, being the 2d judicial day of the term, to wit:

Journal Entry Allowing Demurrer Withdrawn with Leave to Answer.

D. W. APPLEGATE
vs.
B. F. DOWELL. }

Comes now defendant by Att'y J. F. Watson, and asks leave to withdraw his demurrer, with leave until Oct. 21, 1886, to answer.

It is therefore ordered that defendant be and hereby is allowed to withdraw said demurrer, and that leave be granted him until Oct. 21, 1886, to answer.

(Rec. Sig.) R. S. BEAN, *Judge.*

Attest: T. R. SHERIDAN, *Clerk.*

15 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plaintiff,
vs.
B. F. DOWELL, Defendant.

Answer.

The defendant for answer to the complaint—

I. Denies that the plaintiff is or ever was prior to the commencement of this suit, or at any time the owner in fee simple or any other estate whatever of the tract of land described in the complaint or any part thereof.

II. Denies that the plaintiff derived his title or any title to said lands or any part thereof by purchase from Wm. Henry H. Applegate or any other person or in any other manner or from any other source, but admits that plaintiff claims title through the said Wm. Henry H. Applegate; and as to whether or not the plaintiff has a deed from Wm. Henry H. Applegate and Nancy Elizabeth Applegate, his wife, this defendant has no knowledge or information sufficient to form a belief; and as to whether or not a deed was executed by William Henry H. Applegate and Nancy Elizabeth Applegate, his wife, purporting to convey said tract of land to plaintiff, defendant has no knowledge or information sufficient to form a belief; and as to whether or not any such deed was recorded in the records of Douglas county, Oregon, on the 31st day of Oct., 1874, or at any other time, the defendant has no knowledge or information sufficient to form a belief.

16 III. Defendant denies that the deed from William B Gilbert, master in chancery, to the defendant casts a cloud on the title of plaintiff to said forty acres of land or any part thereof.

4. As to whether or not the conveyance of William Henry H. Applegate and wife to plaintiff set up in the complaint is, or was prior to the commencement of the suit of the defendant against Jesse Applegate and others, this defendant has no knowledge or information sufficient to form a belief.

5. Denies that the deed, if any, from William Henry H. Applegate and wife to the plaintiff for said forty acres of land was not in issue in the said suit of B. F. Dowell against Jesse Applegate and others, and denies that it was not determined by said decree.

6. For a further and separate answer and defense to said complaint this defendant alleges that the suit described in the complaint as pending in the circuit court of the United States for the district of Oregon was a creditor's bill of complaint to remove clouds on the title to the lands of Jesse Applegate and to subject *to* the same to the judgment liens of B. F. Dowell against Jesse Applegate's lands, and William H. H. Applegate and Daniel W. Applegate (plaintiff herein) appeared in the said cause, in the said circuit court of the United States for the district of Oregon and answered the said bill of complaint, and one of the main issues in said suit was whether Jesse Applegate or Wm. H. H. Applegate and Daniel W. Applegate were

the owners of the north half of the donation land claim of Jesse Applegate and his wife; and on the 5th day of January, 1883, the said circuit court of the United States for the district of Oregon duly made and entered its decree in said suit, wherein the said court duly found, adjudged and decreed that on and prior to the 19th day of April, 1879, Jesse Applegate was the owner in fee simple of one hundred and twenty-one and forty-five hundredths acres of the north half of the donation land claim of Jesse Applegate and wife, numbered 38, being part of township twenty-two south, of range 5 west, of the Willamette meridian, and situated in Douglas county aforesaid, the same more or less being the whole of the
17 said north half except the portion being the two hundred acres more or less conveyed by Daniel W. Applegate on June 24th, 1871, to Charles and John C. Drain; and that the conveyance of said one hundred and twenty-one and fifty-five hundredths acres by Jesse Applegate to his sons William H. H. Applegate and Daniel W. Applegate by deeds dated April 19 and April 20, 1869, respectively, was voluntary and without any valuable consideration and in fraud of the rights of B. F. Dowell and is, as against him and his assigns, declared and decreed to be null and void, and the said circuit court of the United States for the district of Oregon adjudged and decreed that B. F. Dowell had judgments duly entered in his favor against Jesse Applegate and against the lands of Jesse Applegate and a lien on said one hundred and twenty-one and 55-100 acres of land for the sum of seven thousand four hundred and eighty-eight and 48-100 dollars, together with the costs of the suit, and the defendants, including said Daniel W. Applegate, were required to pay the same within twenty days or the lands above described with other tracts described in said decree should be sold by William B. Gilbert, master in chancery, to pay the same, and the defendant avers this decree was duly enrolled and that it is still in full force and effect and has never been reversed, altered, or modified or annulled.

That on the — day of ——, 1883, the said master in chancery duly sold said land according to said decree and B. F. Dowell became the purchaser thereof for the sum of seven thousand four hundred dollars, and afterwards said master in chancery duly made to him a deed according to said decree, and the same has been duly acknowledged and recorded in the record of deeds in the office of county clerk of Douglas county, Oregon, by means whereof the said Daniel W. Applegate is estopped from disputing the
18 title of the defendant and from maintaining this suit.

That the forty-acre tract of land described in the complaint was and is a part of the one hundred and twenty-one and 55-100 acres hereinbefore described and included in said decree and sold by said master in chancery under said decree and conveyed by said master in chancery to this defendant as hereinbefore set forth.

8. For a further and separate answer and defense to said complaint the defendant alleges that the plaintiff herein and his brother, William H. H. Applegate, at the time of the deed of Jesse Apple-

gate to William Henry H. Applegate and the pretended deed from William Henry H. Applegate to the plaintiff, well knew that Jesse Applegate was largely indebted to the State of Oregon as one of the sureties of S. E. May, late secretary of State, and both of said deeds were made with the intent to cheat and defraud the State of Oregon and B. F. Dowell, one of Jesse Applegate's co-sureties, out of said debt, and the said circuit court of the United States for the district of Oregon, in the case of B. F. Dowell against Jesse Applegate, Wm. H. H. Applegate, and the plaintiff, Daniel W. Applegate and others, duly adjudged and decreed that the deed of Jesse Applegate to William H. H. Applegate for the land described in the complaint to be fraudulent and void as to the rights of B. F. Dowell and ordered the land to be sold to pay B. F. Dowell his said debt as surety with Jesse Applegate of said S. E. May.

That the said William H. H. Applegate and Daniel W. Applegate received said deeds with the intent to cheat, delay, and defraud the State of Oregon and B. F. Dowell out of said debt.

That both of said deeds were made and delivered to Wm. Henry H. Applegate and Daniel W. Applegate without any valuable consideration whatever.

19 That the deed of William H. H. Applegate to his brother, Daniel W. Applegate, was made and delivered without any valuable consideration whatever.

That the tract of land described in the complaint was duly sold by the master in chancery of the said circuit court of the United States for the district of Oregon with other lands under a decree in the said court, wherein B. F. Dowell was plaintiff and Wm. H. H. Applegate and Daniel W. Applegate and others were defendants, and B. F. Dowell became the purchaser of the land described in the complaint without any actual notice of the pretended deed of Wm. H. H. Applegate to Daniel W. Applegate, and without any notice that the plaintiff, Daniel W. Applegate, had any further claim to the land described in the complaint of Daniel W. Applegate against him, and defendant paid a valuable consideration for the same as the property of Jesse Applegate.

That the forty-acre tract of land described in the complaint was a part of the donation land claim of Jesse Applegate and his wife, and the part in dispute was patented by the United States to Jesse Applegate, and Jesse Applegate and his wife deeded the same to Wm. H. H. Applegate, and this deed by said decree was declared fraudulent and void as to the liens of B. F. Dowell by the decree of the circuit courts of the United States for the district of Oregon hereinbefore described.

9. The defendant for a further and separate answer and defense to the complaint alleges that there is no equity in the complaint, and that it shows there is a decree in the United States circuit court for the district of Oregon in favor of the defendant, and that he has a decree authorizing a writ of assistance to issue to put him into possession of the forty acres of land described in the complaint.

20 The State circuit court has no power or authority to enjoin the United States decrees or orders, or to alter, change or modify them in any manner whatever.

The complaint shows on its face that the plaintiff and Wm. H. H. Applegate were both parties to the pr ceedings and decree of the United States circuit court, and no reason is given why the plaintiff, Daniel W. Applegate, neglected to set up his deed or pretended deed from Wm. H. H. Applegate in the United States circuit court.

The complaint shows the plaintiff claims title through Wm. H. H. Applegate, and there is no averment that Wm. H. H. Applegate is or ever was the owner of the land described in the complaint.

There is no averment in the complaint that the plaintiff paid a valuable consideration for the land or that he was an innocent purchaser from Wm. H. H. Applegate without notice of the equities of B. F. Dowell and the State of Oregon.

Therefore the defendant prays that he have the same relief as he would have had on demurrer to the complaint, and this suit be dismissed and that the defendant recover of the plaintiff his costs and disbursements of this suit.

B. F. DOWELL AND
JAMES F. WATSON,
Att'y for Defendant.

21 STATE OF OREGON, } ss:
County of Douglas. }

I, James F. Watson, being duly sworn, say that I am attorney for defendant, and that I have read the foregoing answer, and the same is true, as I verily believe. My reason for making this verification is that B. F. Dowell, defendant, is not in Douglas county, and I am his attorney.

JAMES F. WATSON.

Subscribed and sworn to before me this Oct. 19, 1886.
T. R. SHERIDAN,
County Clerk.

22 Endorsed. No. 39. In the circuit court of the State of Oregon for the county of Douglas. Daniel W. Applegate *vs.* B. F. Dowell. Answer. Filed Oct. 19, 1886, T. R. Sheridan, co. clerk. B. F. Dowell, James F. Watson for def't.

23 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plaintiff, }
vs.
B. F. DOWELL, Defendant. }

Comes now the plaintiff and moves the court to strike out all that portion of the defendant's answer filed herein, to wit:

Commencing with the words "and as to whether or not the plaintiff," on the 17 line of the first page, down to and including the

words "to form a belief," on the 28 line of the first page, for the reason the same is sham, frivolous and irrelevant.

And all that part of the said "answer" commencing with the words, "as to whether or not," on the 4th line of the second page down to and including the words "to form a belief," on the 9th line of the second page, for the reason that the same is sham, frivolous and irrelevant.

And moves to strike out all that portion of said answer, commencing with the words "For a further and separate answer" on the 15th line of the second page, down to and including "as hereinafter set forth," on the 7th line of the fourth page of said complaint, for the reason the same is sham and irrelevant.

And moves to strike out all that portion of said answer, commencing with the words "For a further and separate answer," on the 8th line of the fourth page of said answer, down to and including the words "hereinbefore described," on the 26th line of the fifth page, for the reason that the same is sham, frivolous and irrelevant.

24 And moves to strike out all that portion of the said answer commencing with the words "The defendant for a further," on the 27th line of the fifth page, down to and including the words the "State of Oregon," on the 17 line of the sixth page of said answer, for the reason that the same is sham, frivolous and irrelevant.

C. BALL AND
C. B. WILCOX,
Attorneys for the Plaintiff.

25 Endorsed: Circuit court, Douglas county, State of Oregon. Daniel W. Applegate *vs.* B. F. Dowell. Motion to strike out parts of the answer. Filed Oct. 21, 1886. T. R. Sheridan, clerk. C. Ball and C. B. Wilcox, attorneys for plaintiff.

Be it remembered that at a regular term of the circuit court
26 of Douglas county, Oregon, begun and held in the courthouse in Roseburg, on Monday, Oct. 18, 1886, at which were present: Hon. R. S. Bean, judge; J. W. Hamilton, dis't att'y; B. C. Agee, sheriff; T. R. Sheridan, clerk. Among other proceedings the following was had on Friday, Oct. 29, 1886, it being the 11 judicial day of the term.

D. W. APPLEGATE
vs.
B. F. DOWELL.

Journal Entry Overruling in Part Motion to Strike Out Parts of Answer and Sustaining Part.

Comes now pl't'ff by C. Ball, and J. F. Watson appearing for defendant, and plaintiff having filed his motion to strike out a portion of the answer; the same having been argued and the court now being fully advised in the premises overruled said motion, except to the ninth clause, which is sustained.

(Record signed) R. S. BEAN, *Judge.*

Attest: T. R. SHERIDAN, *Clerk.*

27 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plaintiff,
vs.
B. F. DOWELL, Defendant.

Motion to Make Answer Definite and Certain.

Comes now the plaintiff and moves the court for a rule and order requiring the defendant to make that part of his answer pleaded as a separate answer commencing with the sixth subdivision at the 15th line of page two, at the words "for a further and separate answer," definite and certain as to whether it is the intention of the defendant to charge and allege therein that the title of the plaintiff to the land described in the complaint was in issue in the suit of B. F. Dowell *vs.* Jesse Applegate *et al.* in the circuit court of the United States for the district of Oregon.

C. BALL AND
C. B. WILCOX,
Att'ys for Plaintiff.

28 Endorsed: Circuit court, Douglas county, State of Oregon. Daniel W. Applegate *vs.* B. F. Dowell. Motion to make answer definite and certain. Filed Dec. 28, 1886. T. R. Sheridan, co. clerk. C. Ball and C. B. Wilcox., att'ys for pl'ff.

29 Be it remembered that at a special term of the circuit court of Douglas county, Oregon, begun and held in the court room at the court-house in Roseburg, on Tuesday, January 4th, 1887, at which were present: Hon. R. S. Bean, judge, J. W. Hamilton, dist. att'y; B. C. Agee, sheriff; T. R. Sheridan, clerk. Among other proceedings the following was had on Thursday, January 13, 1887, being the 8th judicial day of the term.

DANIEL W. APPLEGATE, Pl'ff,
vs.
B. F. DOWELL, Def't.

Journal Entry Overruling a Motion to Make Answer Definite and Certain.

Comes now pl'ff by C. Ball, his att'y, and J. F. Watson appearing for def't, and pl'ff having filed his motion to make answer definite and certain, the same having been argued and the court now being fully advised in the premises, overrules said motion with leave to reply.

(Record signed) R. S. BEAN, *Judge.*

Attest: T. R. SHERIDAN, *Clerk*

30 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plaintiff,
vs.
B. F. DOWELL, Defendant.

Demurrer to the Answer.

The plaintiff demurs to the answer of the defendant filed herein, and for the grounds of his demurrer says:

1st. That said complaint does not state facts sufficient to constitute any answer or counter-claim to the complaint of plaintiff.

2d. Demurs to all that portion of said answer pleaded as a separate answer or defense, commencing with the words "for a further and separate answer and defense," on the 15th line of the second page, for the reason that said separate answer does not state facts sufficient to constitute any answer or defense or counter-claim to plaintiff's complaint.

C. BALL,
Attorney for Plaintiff.

31 Endorsed: Circuit court, Douglas county, State of Oregon. Daniel W. Applegate *vs.* B. F. Dowell. Demurrer to the answer. Filed Jan 15, 1887. T. R. Sheridan, clerk. C. Ball, attorney for defendant.

32 Be it remembered that at a special term of the circuit court of Douglas county, Oregon, begun and held in the courthouse in Roseburg on Tuesday, January 4, 1887, at which were present Hon. R. S. Bean, judge; J. W. Hamilton, dist. att'y; B. C. Agee, sheriff; T. R. Sheridan, clerk.

Among other proceedings the following was had on Monday, January 17, 1887, being the twelfth judicial day of the term, to wit:

D. W. APPLEGATE
vs.
B. F. DOWELL.

Journal Entry—Overruling Demurrer to Answer.

Comes now the parties herein by their attorneys, and plaintiff having demurred to the defendant's answer, the same having been argued, and the court now being fully advised in the premises overruled said demurrer.

(Record signed) R. S. BEAN, *Judge.*

Attest: T. R. SHERIDAN, *Clerk.*

33 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plaintiff,
vs.
B. F. DOWELL, Defendant.

Reply.

Comes now the plaintiff, and without waiving any right on ap-

peal to correct any error which the circuit court may have made in its order dated the — day of October, 1866, in overruling the motion of the plaintiff to strike out part of the defendant's answer, but expressly reserving an exception on said ruling by leave of the court first obtained, files this reply to the new matter set up in said answer.

Denies that the suit of B. F. Dowell *vs.* Jesse Applegate *et al.* in the circuit court of the United States for the district of Oregon, one of the main issues was whether Jesse Applegate, or Wm. H. H. Applegate and Daniel W. Applegate were the owners of the north half of the donation land claim of Jesse Applegate and his wife, or that there was any issue in said suit as to whether Daniel W. Applegate, the plaintiff herein, was the owner of any portion of the north half of the donation land claim of Jesse Applegate and his wife, except such portion thereof as is contained in the following description, to wit:

The southeasterly extension of the donation land claim of Jesse Applegate and his wife that lies south and east of the line starting at the northeast corner of said claim, and continued straight upon its course south 31° 20' west until it intersects the southwest boundary of said claim, and denies that any portion of said de-
34 scribed land is contained in the land described in the complaint.

Denies that the title of this plaintiff to the land described in the complaint, or any part thereof, was in issue in said suit of B. F. Dowell *vs.* Jesse Applegate *et al.* in the circuit court of the United States for the district of Oregon, referred to in the answer of the defendant.

Denies that he, the said Daniel W. Applegate, is estopped from disputing the title of the said defendant to the lands described in the complaint, or that the defendant's title is paramount to the title of the plaintiff to the lands described in the complaint, but avers that the title of the defendant is subsequent and subject to the title of the plaintiff to all the lands described in the complaint, and that the defendant's pretended title and claim thereunder is a cloud upon the title of the plaintiff as charged in said complaint, and that the plaintiff is, therefore, entitled to maintain this suit.

Denies that the title of the plaintiff to the forty-acre tract of land described in the complaint was in issue before the circuit court of the United States for the district of Oregon in said suit of B. F. Dowell *vs.* Jesse Applegate *et al.*, or that said court had jurisdiction to include the same in said decree, or that the master in chancery had jurisdiction to sell the same under said decree or to convey the same to the defendant.

Denies that the deed of William Henry H. Applegate to the plaintiff was made with any intent to cheat or defraud the State of Oregon or B. F. Dowell or any person, or that the plaintiff, Daniel W. Applegate, received said deed with any intent to cheat, delay, or defraud the State of Oregon or B. F. Dowell out of said debt or any debt, or that said deed was made or delivered without a valu-

able consideration, but avers that he paid to the said William Henry H. Applegate a full valuable consideration for said forty acres of land described in said complaint and the deed thereto.

35 Denies that said lands were duly sold by said master in chancery or that said master in chancery had jurisdiction to sell and convey any valid title thereto to defendant.

Denies that the defendant purchased said lands without notice of the deed and record thereof of Wm. H. H. Applegate to the plaintiff, Daniel W. Applegate.

But avers that said deed was duly recorded on the 31 day of October, 1874, in vol. 7, at page 124 of the records of deeds of Douglas county, Oregon, where the same has remained of record in the clerk's office of Douglas county, Oregon, ever since said date.

The plaintiff for other and further reply to the new matter set up in the answer of the defendant—

Denies that the circuit court of the United States for the district of Oregon had any jurisdiction to render or enter the decree set out in the said answer of the defendant.

But avers that the Circuit Court of the United States for the district of Oregon had no jurisdiction to entertain or try the suit in equity, referred to in said answer of defendant, of B. F. Dowell *vs.* Jesse Applegate *et al.;* avers that said United States court had no jurisdiction to render any decree in said suit; avers that W. B. Gilbert, the master in chancery referred to in said answer, had no power, authority, or jurisdiction to sell the lands described in said answer or any part thereof and had no jurisdiction or authority to sell the lands described in the complaint or any part thereof.

Avers that said W. B. Gilbers, master in chancery, had no jurisdiction or power or authority to make the deed to the defendant, B. F. Dowell, described in the answer, and alleges that said deed is a void deed.

C. BALL,
Attorney for Plaintiff.

Wherefore the plaintiff prays judgment as demanded in his complaint..

36 STATE OF OREGON, }
County of Douglas, } *ss:*

I, D. W. Applegate, being duly sworn, say that I am the plaintiff in the above-entitled suit, that I have read the foregoing reply, and I believe it to be true.

D. W. APPLEGATE.

Subscribed and sworn to before me, Jan'y 17, 1887.
T. R. SHERIDAN, *Co. Clerk.*

37 Endorsed: Circuit court, State of Oregon, Douglas county. Daniel W. Applegate *vs.* B. F. Dowell. Reply. Filed Jan'y 17, 1887. T. R. Sheridan, clerk. C. Ball, attorney for plaintiff.

38 Be it remembered that at a special term of the circuit court of Douglas county, State of Oregon, begun and held in the court-house, in Roseburg, Douglas county, Oregon, on Tuesday, Jan. 4th, 1887—at which were present Hon. R. S. Bean, judge; J. W. Hamilton, dist. att'y; T. R. Sheridan, clerk; B. C. Agee, sheriff—among other proceedings the following was had, on Thursday, Jan. 20, 1887, being the 15th judicial day of the term:

DANIEL W. APPLEGATE)
vs.
B. F. DOWELL.)

Journal Entry Disallowing Application for a Reference & that Cause be Tried by the Court.

Comes now the plaintiff and moves the court for an order referring this cause to some competent person to take the evidence and report the same with findings of fact to the court, and the counsel for the defendant having stated in open court that defendant waives all issues as to the sufficiency of the consideration of the deed from Wm. H. H. Applegate to the plaintiff, Daniel W. Applegate.

It is ordered the application for a reference be, and the same is disallowed, and it is ordered that said cause be tried by the court; to which ruling of the court the defendant excepts; which exception is allowed by the court.

39 DANIEL W. APPLEGATE)
vs.
B. F. DOWELL.)

Journal Entry Disallowing Application for a Reference and that Cause be Tried by the Court, and that Parties Have 10 Days in which to File Briefs.

Comes now the parties herein by att'ys and by consent of parties they have 10 days in which to file written briefs and that this case be continued.

(Record signed) R. S. BEAN, *Judge.*

Attest: T. R. SHERIDAN, *Clerk.*

40 Be it remembered that at a special term of the circuit court of Douglas county, State of Oregon, begun and held in the court-house in Roseburg, Douglas Co., Oregon, on Tuesday Jan. 4th, 1887, at which were present: Hon. R. S. Bean, Judge, J. W. Hamilton, dist. att'y, T. R. Sheridan, clerk; B. C. Agee, sheriff, among other proceedings the following was had on Friday, January 21, 1887, being the 16th judicial day of the term:

D. W. APPLEGATE
vs.
B. F. DOWELL.

Journal Entry—Cause Submitted Without Argument on Records Presented, and Same Taken Under Advisement.

Comes now the parties herein by their respective attorneys and this case is submitted to the court without agument upon the records presented, and the court not being advised in the premises takes the same under advisement.

(Record signed) R. S. BEAN, *Judge.*

Attest: T. R. SHERIDAN, *Clerk.*

41 In vacation.

STATE OF OREGON, *County of Douglas,* } *ss:*

In the Circuit Court of the State of Oregon for Douglas County.

In vacation after the special January Term A. D. 1887, to wit, on March 17, 1887.

In the Circuit Court of the State of Oregon for Douglas County.

DANIEL W. APPLEGATE, Pl'ff,
vs.
B. F. DOWELL, Def't.
} Suit in Equity to Determine Interest in Real Property.

Journal Entry—Decree.

The above-entitled suit coming on for trial at the special January term, 1887, of the above-entitled court, plaintiff appearing by C. Ball, his attorney, and defendent by Watson, Hume & Watson, his attorneys, whereupon plaintiff offered in evidence *a* duly-certified copies of a deed for the land in dispute in this suit from Wm. Henry H. Applegate and wife, to plaintiff of date October 8th, 1874, and a deed for same premises from W. B. Gilbert as master in chan-
42 cery of the circuit court of the United States for the district of Oregon to defendant, of date December 6th, 1883, both said deeds were duly admitted whereupon plaintiff rested his case.

Defendant then offered in evidence duly-certified copies of the amended bill, answer of Daniel W. Applegate and decree in the case of B. F. Dowell against Jesse Applegate and others in the circuit court of the United States for the district of Oregon (defendant duly objected to the admission of said evidence as incompetent, irrelevant, immaterial, and because the U. S. court did not have jurisdiction to render the decree contained therein.

The court being in doubt as to what order should be made concerning the admision of said evidence after hearing the argument of counsel reserved the same for further consideration.)

Defendant then rested his case.

Now at this time the court having fully considered said objection and being fully advised in the premises, overrules the same and admits said record in evidence.

It appearing to the satisfaction of the court, from said record of the circuit court of the United States for the district of Oregon, that the decree of said court made and entered by said court on the 5th day of January, 1883, in the said case of B. F. Dowell against Jesse Applegate and others, this plaintiff being one of said defendants is a bar to this suit.

It is therefore ordered, adjudged and decreed that plaintiff's complaint herein be and the same is hereby dismissed, and that defendant have judgment for his costs and disbursements, and this plaintiff have sixty days in which to file a bill of exceptions.

Dated March 16, 1887.

R. S. BEAN, *Judge.*

43 It is therefore ordered and adjudged that defendant, B. F. Dowell, have and recover a judgment against plaintiff, Daniel W. Applegate; that the complaint be dismissed and that defendant have a judgment for his costs and disbursements herein incurred taxed at $———, and that execution issue therefor.

Received, filed and entered the foregoing of record March 17, 1887.

T. R. SHERIDAN, *Clerk.*

44 In the Circuit Court of the State of Oregon for the County of Douglas.

D. W. APPLEGATE, Plaintiff,
vs.
B. F. DOWELL, Defendant.

1st Notice of Appeal.

To B. F. Dowell, defendant in the above-entitled suit:

You are hereby notified that the plaintiff, D. W. Applegate, appeals to the supreme court of the State of Oregon from the judgment, order and decree of the circuit court of the State of Oregon for the county of Douglas, dated on the 16th day of March, 1887, and filed and entered of record in said court and cause on the 17th day of March, 1887, in favor of the defendant and against the plaintiff, dismissing plaintiff's complaint and awarding costs in favor of said defendant against the plaintiff, and from the judgment entered in said court and cause upon said decree on the 17th day of March, 1887, dismissing plaintiff's complaint, and in favor of the defendant for his costs and disbursements for the sum of $——— and this appeal is taken from the whole of said decree and judgment.

The plaintiff hereby assigns the following errors upon which he intends to rely on said appeal for a reversal of said judgment, and for a decree in his favor as prayed for in his bill of complaint:

1st. That the circuit court erred in its judgment order made and

entered in said court and cause on the 29th day of October, 1886 in overruling plaintiff's motion to strike out a portion of the defendant's answer as fully appears from the record of said cause and the bill of exceptions filed herein.

2d. That the circuit court erred in its judgment order made and entered on the 17th day of January, 1887, in overruling plaintiff's demurrer to the defendant's answer and in failing to sustain said demurrer, all of which fully appears from the record of said cause and from the bill of exceptions filed in said court and cause.

3d. That the circuit court erred in refusing to refer said cause to a competent person to take the testimony and report findings of fact, all of which appears by the bill of exceptions.

4th. The circuit court erred in the trial of said suit in admitting in evidence against the objections of the plaintiff the copy of the amended bill in the case of B. F. Dowell *vs.* Jesse Applegate and others in the circuit court of the United States for the district of Oregon, and to the admission of which plaintiff duly excepted as fully appears from the record and from the bill of exceptions herein.

5th. The said circuit court erred in admitting in evidence against the objection of the plaintiff the copy of the answer of Daniel W. Applegate to said amended bill in said suit of B. F. Dowell *vs.* Jesse Applegate *et al.* in the circuit court of the United States for the district of Oregon, to the admission of which the plaintiff duly excepted, as fully appears from the record and bill of exceptions herein.

6th. The said circuit court erred in admitting in evidence the copy of the decree of the circuit court of the United States for the district of Oregon in the cause of B. F. Dowell *vs.* Jesse Applegate *et al.*, to the admission of which plaintiff duly excepted, as fully appears by the record and bill of exceptions in this suit.

7th. The said circuit court erred in its judgment in said cause in decreeing that the judgment decree of the United States circuit court in the suit of B. F. Dowell *vs.* Jesse Applegate *et al.* is a bar to this suit.

46 8th. The decree of the said circuit court is not supported by the evidence, but is against the law and the evidence, and that said circuit court erred in failing to find from the evidence and the admissions of the defendant that the plaintiff is the owner in fee simple of the land described in the complaint, and that the claim of the defendant is a cloud on plaintiff's title.

9th. That said circuit court erred in failing to decree that the cloud which *the claim* the defendant makes to said land described in said complaint on the title of the plaintiff thereto be removed, and in failing to give judgment in favor of the plaintiff for his costs and disbursements.

10th. That said circuit court erred in failing to make out and file findings of fact on the issues presented by the pleadings in this suit.

C. BALL,
Attorney for Plaintiff.

STATE OF OREGON, } ss:
County of Douglas, }

I, C. Ball, being duly sworn, say that I am the attorney for the plaintiff in the above-entitled suit.

That the defendant, B. F. Dowell, has no attorney residing or within this Douglas county.

That J. F. Watson, the attorney of record for said defendant, resides in Portland, Multnomah county.

That the said defendant, B. F. Dowell, is not within said State or county at this time, but, as I am informed and believe, is residing at the present time in Washington city, District of Columbia.

That I served the foregoing notice of appeal on the de-
47 fendant by depositing a true and correct copy of said notice of appeal, duly certified to by me as attorney for the plaintiff, inclosed in an envelope, in the United States post office in Roseburg, Douglas county, Oregon, with the postage prepaid thereon, directed to the said B. F. Dowell, at Washington city, D. C., and also by depositing a copy thereof, duly certified as aforesaid, in said post office, with postage prepaid, directed to J. F. Watson, Portland, Oregon, and by also serving a copy thereof, duly certified as aforesaid, on T. R. Sheridan, county clerk of Douglas county and clerk of said circuit court, for the defendant: all on Saturday, the 21st day of May, 1887. C. BALL.

Subscribed and sworn to before me May 21, 1887.
T. R. SHERIDAN, *Co. Clerk.*

I do hereby further swear that I also on this 21st day of May, 1887, deposited a true copy of said notice of appeal, duly certified to by me as attorney for the plaintiff, in the United States post office in Roseburg, Douglas county, Oregon, inclosed in an envelope, with the postage prepaid thereon, and addressed to said defendant, B. F. Dowell, at Portland, Oregon. C. BALL.

Subscribed and sworn to before me May 21, '87.
T. R. SHERIDAN, *Clerk.*

48 Endorsed: Circuit court, Douglas county, State of Oregon. D. W. Applegate *vs.* B. F. Dowell. Notice of appeal. Filed May 21, '87. T. R. Sheridan, clerk. C. Ball, attorney for plaintiff.

49 In the Circuit Court of the State of Oregon for the County of Douglas.

D. W. APPLEGATE, Plaintiff, }
vs.
B. F. DOWELL, Defendant. }

1st Undertaking on Appeal.

Whereas the above-named plaintiff, D. W. Applegate, has appealed to the supreme court of the State of Oregon from the judgment, order and decree of the circuit court of the State of Oregon for Douglas

county, entered therein in the above-entitled suit on the 17th day of March, 1887, dismissing plaintiff's complaint and giving judgment for the defendant against the plaintiff for costs and disbursements taxed at $—: therefore we, D. W. Applegate, appellant, and Joseph Cellers, surety, undertake that the appellant will pay all damages, costs and disbursements that may be awarded against him on appeal.

Dated May 25, 1887.

D. W. APPLEGATE, *Appellant.*
JOS. CELLERS, *Surety.*

50 STATE OF OREGON, } ss:
County of Douglas, }

I, Jos. Cellers, being duly sworn, say that I am the person named in, and who executed, the foregoing notice of appeal as surety thereon; that I am a resident freeholder of Douglas county, Oregon, and I am worth the sum of three hundred dollars over and above all my just debts and liabilities and exclusive of property exempt from execution.

JOS. CELLERS.

Subscribed and sworn to before me this 25th day of May, A. D. 1887.

R. L. SHELLY,
Justice of the Peace.

51 Endorsed: Circuit court, Douglas county, State of Oregon. D. W. Applegate *vs.* B. F. Dowell. Undertaking on appeal. Filed May 26, 1887. T. R. Sheridan, clerk. C. Ball, attorney for plaintiff.

52 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plaintiff, }
vs.
B. F. DOWELL, Defendant. }

2d Notice of Appeal.

To B. F. Dowell, the above-named defendant, and to James F. Watson, his attorney:

You and each of you will please take notice that D. W. Applegate, the above-named plaintiff, appeals from the judgment and decree of the circuit court of the State of Oregon for the county of Douglas, dated the 16th day of March, 1887, and filed and entered of record in said court and cause on the 17th day of March, 1887, in favor of the defendant and against the plaintiff, and wherein it was ordered adjudged, and decreed that plaintiff's complaint be dismissed and that defendant have and recover from plaintiff his costs and disbursements, and this appeal is taken from the whole thereof to the supreme court of the State of Oregon.

R. & E. B. WILLIAMS,
Attorneys for Plaintiff.

53 STATE OF OREGON, } ss:
County of Douglas, }

Due services of the within notice of appeal is hereby accepted at Roseburg, Oregon, this 5th day of August, 1887, by receiving a copy thereof, duly certified as such by E. B. Williams, counsel for plaintiff, and it is also hereby admitted that B. F. Dowell, the defendant herein, does not reside in Douglas county, and that said Dowell is not within the State of Oregon, and I hereby enter my appearance herein as attorney for said Dowell.

J. F. WATSON,
Attorney for B. F. Dowell.

54 Endorsed: In the circuit court of the State of Oregon for the county of Douglas. Department No.—. Daniel W. Applegate *vs.* B. F. Dowell. Notice of appeal. Filed Aug. 8, 1887. T. R. Sheridan, clerk. By W. T. Wright, deputy clerk. R. & E. B. Williams, attorneys for Applegate, the appellant.

55 In the Circuit Court of the State of Oregon for Douglas County.

DANIEL W. APPLEGATE, Plaintiff,
vs.
B. F. DOWELL, Defendant. } Undertaking on Appeal.

2d Undertaking on Appeal.

Whereas the above-named plaintiff, D. W. Applegate, in the above-entitled suit appeals to the Supreme Court of the State of Oregon from a judgment and decree made and entered against him in the said suit in the said circuit court in favor of the defendant in the said suit on the 17th day of March, A. D. 1887, dismissing plaintiff's complaint and giving judgment against plaintiff for costs and disbursements taxed at $——. Now, therefore, in consideration of the premises and of such appeal, we the undersigned, D. W. Applegate and (G. J. Fuller), of the county of Douglas, State of Oregon, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal.

D. W. APPLEGATE. [SEAL.]
G. J. FULLER. [SEAL.]

56 STATE OF OREGON, } ss:
County of Douglas, }

I, G. J. Fuller, whose name is subscribed to the within undertaking as surety, being duly sworn, says: That I am a resident and freeholder within the State of Oregon, and am not a counsellor or attorney-at-law, sheriff, clerk, or other officer of any court, and am

worth the sum of three hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

G. J. FULLER.

Subscribed to and sworn before me this 8th day of August, A. D. 1887.

T. R. SHERIDAN, *Clerk.*
By W. T. WRIGHT, *Deputy Clerk.*

57 Endorsed: In the circuit court, State of Oregon, county of Douglas. Daniel W. Applegate, plaintiff, *vs.* B. F. Dowell, defendant. Undertaking on appeal. Filed this eighth day of August, 1887. T. R. Sheridan, clerk. By W. T. Wright, deputy clerk.

58 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem on the first Monday, the third day of Oct., 1887—present: Hon. William P. Lord, chief justice; Hon. W. W. Thayer, associate justice; Hon. Reuben S. Strahan, associate justice, and W. H. Holmes, clerk—the following proceedings were had on Monday, the 19th day of December, 1887, the same being the 40th judicial day of said term:

D. W. APPLEGATE, Appellant,
vs.
B. F. DOWELL, Respondent. } Appeal from Douglas county.

Decree of Supreme Court.

This cause having been heretofore argued and submitted to the court and by the court taken under advisement, and now the court being fully advised as to all matters pertaining to said cause, finds there is error as alleged. It is therefore ordered and adjudged by the court that the judgment of the court below from which this appeal was taken be and the same is hereby in all things reversed and set aside, and further ordered that this cause be remanded to the court below and that a new trial be there had of the issues joined in the pleadings in said cause.

It is further ordered and adjudged that the appellant have and recover judgment against the respondent for the costs and disbursements of this appeal in this court allowed and taken at $113, and that this cause be remanded to the court below and that a judgment be there entered of record and docketed in accordance herewith.

59 STATE OF OREGON, } *ss:*
Marion County, }

I, W. H. Holmes clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript there-

from and of the whole of such original as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Salem, Oregon, this 7th day of Jan., 1888.

[SEAL.] W. H. HOLMES, *Clerk.*

To the circuit court of the State of Oregon for the county of Douglas:

You are hereby commanded that of the above judgment order of our supreme court you cause proper entry to be made upon the records of your court as of a judgment therein and proceed to final determination and execution thereof as to the said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 7th day of Jan., 1888.

[SEAL.] W. H. HOLMES, *Clerk.*

60 Endorsed: In the supreme court of the State of Oregon, Oct. term, 1887. D. W. Applegate *vs.* B. F. Dowell. Filed and entered May 7, 1888. T. R. Sheridan, clerk.

61 Be it remembered that at a regular term of the circuit court for Douglas county, Oregon, begun and held at Roseburg, Oregon, on May 7th, 1888—at which were present Hon. R. S. Bean, judge; Jas. W. Hamilton, dist. att'y; T. R. Sheridan, clerk; B. C. Agee, sheriff—among other proceedings the following was had on Monday, May 7th, 1888, being the 1st judicial day of the term:

D. W. APPLEGATE, Pl'ff.
vs.
B. F. DOWELL, Def't.

Journal Entry.—Cause Taken — Advisement.

Comes now plaintiff, by J. W. Hamilton, attorney, and defendant appearing by J. F. Watson, his attorney, and this suit coming on to be tried on the papers presented and the same having been submitted without argument, and the court not being fully advised in the premises, took the same under advisement.

(Record signed) R. S. BEAN, *Judge.*

Attest: T. R. SHERIDAN, *Clerk.*

62 Be it remembered that at a regular term of the circuit court for Douglas county, Oregon, begun and held at Roseburg, Oregon, on May 7th, 1888, at which were present Hon. R. S. Bean, judge; Jas. W. Hamilton, dist. att'y; T. R. Sheridan, clerk; B. C. Agee, sheriff—

Among other proceedings the following was had on Monday, May 14, 1888, being the 7th judicial day of the term, to wit:

In the Circuit Court of the State of Oregon for Douglas County.

DANIEL W. APPLEGATE, Plaintiff.
vs.
B. F. DOWELL, Defendant.

Journal Entry—Judgment of Circuit Court.

The above-entitled suit coming on for trial at the regular May term, 1888, of the above-entitled court, plaintiff appearing by J. W. Hamilton, his attorney, and defendant by Watson, Hume and Watson, his attorneys.

The court, after hearing the allegations, evidence, and stipulations of the parties, and being fully advised in the premises, finds:

(1.)

That on the 9th day of December, 1865, the Government of the United States duly issued its patent to Jesse Applegate and Cynthia Ann Applegate, his wife, for a donation land claim of 640 63 acres situate in Umpqua, now Douglas county, Oregon; said claim being designated in said patent as Not. No. 542, claim No. 38, being part of sections 21–22–27 and 38 in township 22 south, of range 5 west.

The N. ½ of said claim being designated as the part enuring to the husband and the south ½ to the wife.

(2.)

That on April 19, 1869, said Jesse Applegate and Cynthia Ann Applegate, his wife, duly conveyed to W. H. H. Applegate a portion of said north ½ of said donation land claim mentioned in finding No. 1, which said deed of conveyance included the land described in the complaint in this suit and now in dispute between the parties hereto.

This deed was duly recorded in vol. 4, record of deeds for Douglas county, Oregon, on page 488, on May 4, 1869.

(3.)

That on the 8th day of October, 1874, said W. H. H. Applegate and Nancy E. Applegate, his wife, duly conveyed to the plaintiff the real property described in the complaint in this suit, and particularly described as follows:

A part of the donation claim of Jesse Applegate, claim No. 38, Not. No. 542, of township 22 S., of R. 5 west: Beginning at the southwest corner of the tract of land heretofore sold by Wm. Henry H. Applegate to Charles Drain; thence S. 31° 20′ west along the original boundary of claim No. 38 seven chains and forty-three links to the southwest corner of the tract of land sold to Wm. Henry H. Applegate by Jesse Applegate and Cynthia Ann Applegate, his wife; thence N. 89° 15″ E. along the north boundary of the lands of Peter S. and Daniel W. Applegate sixty-three (63) chains to Wm. Henry H. Applegate's southeast corner; thence north 31° 20″ east seven chains and forty-three links to Charles Drain's southeast corner; thence S. 89° 15′ W. along Drain's line sixty-three chains to

the place of beginning, containing 40 acres, which said deed was duly recorded in the record of deeds of Douglas county, Oregon, on the 31st day of October, 1874.

64 That said real property in this finding described was included in the description contained in the deed mentioned in finding No. 2.

(4)

That said plaintiff was at the commencement of this suit in the possession of said real property described in finding No. 3, and had been in such possession for a long time prior thereto.

(5)

That the suit referred to in the pleadings in this suit as pending in the circuit court of the United States for the district of Oregon was a creditor's bill brought by defendant against Jesse Applegate, Cynthia Ann Applegate, Sallie Long, Wm. Henry H. Applegate, Daniel W. Applegate, Charles Drain, John C. Drain, Jonas Ellensberg, Peter Applegate and Charles Putnam; the amended supplemental bill of plaintiff therein being as follows:

In the Circuit Court of the United States for the District of Oregon.

To the judges of the circuit court of the United States for the district of Oregon, sitting in chancery at Portland:

I. Your orator, B. F. Dowell, a citizen of the State of Oregon and resident of the town of Jacksonville, brings this his bill against the following-named citizens of this State who reside in Oregon, at the following-named places:

Jesse Applegate, Cynthia Ann Applegate, Sallie Long and Wm. Henry H. Applegate, of Yoncalla; Daniel W. Applegate, Charles Drain, John C. Drain and Jonas Ellensberg, of Drain's Station; Peter Applegate and Charles Putnam, of Lake county, Oregon, defendants.

II. And thereupon your orator complains and says:

That in June, 1866, S. E. May was elected secretary of the State of Oregon, and on the 4th day of August, 1866, he gave his

65 official bond in the penal sum of $10,000 to the State of Oregon, with your orator and said Jesse Applegate as his official securities.

III. That on the 4th day of August, 1874, the State of Oregon recovered on said bond a judgment against your orator and the defendant, Jesse Applegate, the sum of $8,929.85 debt, together with the costs and expenses and disbursements of the action in the circuit court of the State of Oregon for the county of Marion, and on the 11th day of August, 1877, a transcript of the judgment-lien docket of Marion county, Oregon, was duly filed in the clerk's office of Douglas county, and the judgment duly entered on the judgment-lien docket of Douglas county, Oregon.

IV. That prior to the 27th day of June, 1878 your orator paid on said judgment $10,837.75, and on the day and year last

aforesaid your orator recovered a judgment against the defendant, Jesse Applegate, as his co-security on said payments, the sum of $4,882.19 debt, and the costs, expenses and disbursements of the action in the circuit court of the State of Oregon for the county of Douglas, and on the same day this judgment was entered in the judgment-lien docket of Douglas county, Oregon.

V. That on the 16th day of November, 1878, your orator paid on the judgment in favor of the State of Oregon, $1,385.61, the balance due on said judgment in full satisfaction of the same.

VI. That within one month from the time of the last-mentioned payment, to wit:

On the 28th day of November, 1878, your orator gave notice to George Edes, clerk of the circuit court of the State of Oregon for the county of Marion, that he claimed the benefit of the said judgment of the State of Oregon against the defendant, Jesse Applegate, for contribution for the said sum of $1,385.61 and the costs and expenses as is required by the statute of Oregon (Code, page 170, § 295), and the same was duly entered on the records of said court in the margin of the said judgment of the State of Oregon.

66 VII. That on the 4th day of April, 1879, an execution was duly issued by the clerk of the circuit court of the State of Oregon for the county of Marion, for the said sum of $1,385.61 and the costs, expenses and disbursements of the sheriff of Douglas county who, on the 31st day of May, 1879, sold the lands to Jesse Applegate for upwards of $1,200 on the day and year last aforesaid, which, after paying the costs and expenses your orator received from George Edes from the sale on said execution $1,101, leaving still due your orator on the judgment of the State of Oregon $284.61 with interest thereon from the 31 day of May, 1879, until paid and the accruing costs, expenses and disbursements of the action.

The cost of said action of your orator amounts to the sum of $146.69 and the interest on both of said judgments to the 1st of January, 1881, amounted to the sum of $1,270.60, making an aggregate of $6,584.09, which amount is still due your orator and is unpaid.

VIII. That the said S. E. May was elected secretary of the State of Oregon in 1862, and on the 6th day of September, 1862, he gave his official bond with the said Jesse Applegate, O. Jacobs, and James Kilgore as his official securities, in the penal sum of $10,000, and the said May acted as secretary of State four years, and during the time he became a defaulter to the State of Oregon in a large sum of money, to wit, the sum of $1,622.69, and on the 24th day of June, 1874, the State of Oregon recovered a judgment on the said bond against S. E. May and Jesse Applegate, O. Jacobs and James Kilgore, in the circuit court of the State of Oregon for the county of Marion for the last-mentioned sum of money and the costs, expenses and disbursements of the action.

IX. That in 1849 Jesse Applegate took up a donation land claim under the laws of the provisional government of Oregon and afterwards under the act of Congress entitled "an act to create the office

of surveyor-general of the public lands in Oregon and to provide for the survey and to make donations to settlers of the said public lands," approved 27th of September, 1850, he gave notice to
67 the surveyor-general of Oregon that he claimed the land under said act of Congress, which tract of land is known on the surveys and maps of the United States in the land office at Roseburg, Oregon, as Jesse Applegate's donation land claim No. 38, notification No. 54, certificate No. 103, in township 22 south, of range 5 west of the Willamette meridian, containing 642 acres; and he made due proof of his marriage with Cynthia Ann Applegate, of his residence and cultivation for four consecutive years, commencing on the 28th day of Feb., 1849, and at the time of committing the grievance hereinafter mentioned he was the owner in fee simple of the north half of said donation land claim, and he had a life estate in the south half of said donation land claim which was set apart to his wife, Cynthia Ann Applegate; that on the — day of ——, 18—, he was duly married to Cynthia Ann —— at Howard county, in the State of Missouri, and prior to the taking up of said donation land claim they had children born alive, the fruits of said marriage, who now reside in Douglas county, Oregon; and he was the owner in fee simple of the following described tracts of land, namely: The N. ½ of the S. W. ¼ and the S. ½ of the N. W. ¼ of section 23, township 23 south, of range 5 west of the Willamette meridian, containing 160 acres; also a tract lying on Bass creek, in Douglas county, Oregon, and described in the surveys of the United States as the east half of the southwest quarter and the west half of the northwest quarter, and the southeast quarter of the northwest quarter of section 4, and the northeast quarter of the northwest quarter of section 9, containing 240 acres; also the northwest quarter of the southwest quarter of section 28, in township 22 south, of range 5 west, containing 40 acres, and the S. E fractional ¼ of the N. E. ¼ of section 28, of township 22 south, of range 5 west, containing 1 31-100 acres; the north ½ of the S. W. ¼ and the S. ½ of the N. west ¼ of section 23, township 23 south, range 5 west of the Willamette meridian, containing 160 acres, and all of said lands lie in Douglas county,
68 in the State of Oregon.

X. That the said Jesse Applegate and his wife, Cynthia Ann Applegate, with intent to delay, cheat and defraud the State of Oregon and your orator out of said debt, deeded all of said tracts of lands to their children as follows:

To William Henry H. Applegate, their son, 160 acres of the north half of said donation land claim by deed dated the 6th day of April, 1867, for the apparent consideration of $500, and this deed was recorded in said Co. the 6th of February, 1869; also 80 acres of said donation land claim by deed dated the 19th day of April, 1869, for the apparent consideration of one dollar, and it was recorded the 4th day of May, 1869; to Daniel W. Applegate, their son, 160 acres of Jesse Applegate part of said donation land claim, and by deed dated 6th April, 1867, for the apparent consideration of $500, which deed was recorded 6th Feb., 1869; also 80 acres of said

donation land claim, for the apparent consideration of one dollar, which was recorded 5th of May, 1869. To Charles Putnam, a grandson of Jesse Applegate and his said wife, 240 acres of land on Pass creek, by deed dated 19th of April, 1869, which deed was recorded the 4th day of May, 1869, and to Peter Applegate, their son, 211. 31-100 acres of land, being 170 acres of said donation land claim and the said 40 acres and said 1 31-100 acres; also to Sally Applegate, on the 2d day of December, 1871, the said 160 acres in township 23 south, range 5 west, for the apparent consideration of $500, and Sallie Applegate has since married John J. Long.

XI. That said Sallie had actual notice of the indebtedness of Jesse Applegate prior to the time she received said deed from Jesse Applegate; that she was a witness to the official bond of S. E. May, which was signed by Jesse Applegate and B. F. Dowell, and that she signed the same as a subscribing witness at the time it was executed by Jesse Applegate, and she was a witness as to the signature of her father, Jesse Applegate.

69 XII. All of the foregoing described deeds are illegally recorded in the county clerk's office of Douglas county, State of Oregon, and the recording are void acts, and for a more particular description of the land conveyed by each deed reference is given to said record.

XIII. Your orator is informed and believes that each and all of said grantees received their deeds severally with the intent to delay, cheat and defraud the State of Oregon and your orator out of said debt; that each and all of them had notice that the said Jesse Applegate was largely indebted to the State of Oregon as the security of S. E. May on said bonds at the time each deed was made and delivered, and they well knew that the said deeds would make the grantor, Jesse Applegate, insolvent.

XIV. That he is informed and believes that the said deed to Wm. H. H. Applegate, dated in 1867, and the said deed to Daniel W. Applegate, also dated in 1867, was antedated to deceive, cheat, delay and defraud the State of Oregon and your orator out of said debts; that neither of these deeds were made and delivered until February, 1869.

That the pretended money consideration in each and all of said deeds is an inadequate price; that south ½ of said donation land claim was worth $20 per acre, and all the balance of said tract of land *were* reasonably worth $10 per acre at the time each and all of said deeds were made and delivered, except the land deeded to Putnam and Sallie Applegate, and these tracts of land were worth $8 per acre. And that said deeds were each and all of them made without any valuable consideration whatever; that neither of the said grantees paid the said Jesse Applegate or his wife a cent of money for the lands described in said deeds; that the money consideration expressed in each of said deeds is false and fictitious, and each and all of them were made and delivered with the intent of deceiving, cheating, delaying and defrauding the creditors of Jesse Applegate, including your orator.

70 XV. That each and all of said deeds are constructively fraudulent as to the State of Oregon and the debt of your orator; that said deed of Peter Applegate has a reservation for the use and benefite of the grantees; that

Jesse Applegate was indebted to the State of Oregon on said bonds with S. E. May defalcation, which created said debts prior to and at the time of the making and delivery of each and all of said deeds to the grantees, and he is informed and believes that each and all of said deeds were made and delivered by Jesse Applegate to the recorder of Douglas county, Oregon, without any valuable consideration, and he well knew at the time of the delivery of each of said deeds that they would make him insolvent; that the balance of his property consisted of a few cattle and wild hilly lands, wholly inadequate to pay all his debts, and he now has no other goods, chattels, lands or tenements to pay your orator's said judgments.

That on the 17th day of September, 1879, the clerk of the circuit court of the State of Oregon for the county of Douglas duly issued an execution on the judgment of your orator against the property of Jesse Applegate for the said sum of $4,882.31 debt and costs to the sheriff of Jackson county, Oregon, who duly returned the same no property found, and that on the 7th day of October, 1879, said clerk duly issued another execution on the last-mentioned judgment to the sheriff of Douglas county, in the State of Oregon, where the defendant resides, and the sheriff of Douglas county has duly determined said execution endorsed, no goods, chattels, lands or tenements of the defendant Jesse Applegate found in his county.

XVI. That on the 24th day of June, 1871, the said Wm. Henry H. Applegate deeded 200 acres of the north half of said donation land claim to Charles Drain and his son John C. Drain for the sum of $2,000 cash.

Your orator is advised by his counsel and believes this deed is illegal, fraudulent and void

71 That the actual price paid the said Applegate for said land was $2,000, yet the deed to concede the value of the land and to cheat and defraud the creditors of Jesse Applegate and to make the price correspond with the said deed of Jesse Applegate and his wife the said Wm. H. H. Applegate on its face only expresses the consideration of $500, and it, in place of having a revenue stamp of $2, as was required by the act of Congress at the date of said deed, only has a revenue stamp of 50 cents on it.

XVII. And he is advised by his counsel and believes that each and all of said deeds to Wm. H. H. Applegate, Daniel W. Applegate, Charles Putnam, Peter Applegate, and Sallie Applegate, Charles Drain and John C. Drain are illegal and a fraud under the statute of the United States entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt," approved 30th day of June, 1864, and the amendments thereunto, that an inadequate consideration was expressed in each of said deeds by the grantors and *grantors* with the intent of evading the provisions of said statute.

That the grantors and grantees well knew the land conveyed by each deed was at the date thereof worth in cash more than $1,000, and each of them have a revenue stamp on them of 50 cents and no more, not one-half the amount required by said act of Congress, and the recording of each of them was in violation of the spirit-meaning of sections 152, 156, 158 of said statute; that none of said stamps have been cancelled by writing the date when the deed was so used or stamps affixed on the same, and none of them have the initials of the person using them or affixing the same prior to the placing said deed on the records of Douglas county in the State of Oregon.

XVIII. That on the 8th day of June, 1878, the said Charles Putnam deeded said N. E. ¼ of section 9, township 22 south, of range 5 west, to Laura T. Hicketheier for the sum of $320 cash in gold coin of the United States, which deed was on the 10th of June, 1878, *was* duly recorded in Douglas county in the State of Oregon.

72 XIX. Your orator is informed and believes that on the 19th day of January, 1879, said Charles Putnam and his wife Elizabeth sold the S. E. ¼ of section 4, in township 22 south, range 5 west, containing 40 acres, to Jonas Ellenberg for the sum of $320, all of which has been paid except $75 or $100, the exact amount your orator is wholly unable to state, and the said Putnam then and there delivered to said Ellenberg a paper-writing in the form of a deed, without any seal, for this tract of land, and the same has been illegally recorded in Douglas county, Oregon.

XX. That each and all of said deeds and the said paper-writing are clouds on the title of said Jesse Applegate to said tracts of land, and each of them depreciate the value of the land described in them and depreciate the value of your orator's lien on the same.

XXI. That the said grantees have each and all of them had the possession of the said tracts of land severally deeded to them and the rents, issue and profits thereof for the last six years prior to the commencement of this suit, except said Putnam, Ellensberg and Hicketheir, and that the same is of the value of $1.25 per acre for each year, except the land deeded to said Putnam, Hicketheir and Ellensberg, and Putnam has cut and sold timber of great value off of said lands, and that it is necessary to take an account of the rents and profits of each of said tracts of land and the amount and value of said timber.

XXII. To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths and according to the best and utmost of their several and respective knowledge, remembrances, information and belief full, true, direct, and perfect answer make to such of the several interrogatories hereinafter mentioned and set forth as *to* by the note hereunder written they are respectively required to answer, that is to say—

73 (1.)

Whether the foregoing complaint is true, and in what particulars?

(2.)

If any part is false, state fully in what particular it is untrue.

(3.)

How much is still due on the sale of the land to Jonas Ellensberg?

(4.)

How many cords of wood has Charles Putnam sold off the land deeded to him by Jesse and Cynthia Ann Applegate?

(5.)

How much did Putnam receive for the wood sold off of said land?

(6.)

Who was indebted to Jesse Applegate out of the State of Oregon at the time Jesse Applegate made deeds to his children in 1867, 1869, 1871?

(7.)

What was the consideration of each of these debts?

(8.)

When was each of these debts contracted, and how often have the notes been renewed?

(9.)

Were they all notes or were some of them open accounts?

(10.)

Give particularly the names of the payees of each note and each account and the amount of each, and the date each first became due and the post-office address of each payee.

XXIII. *Prayer.*

1. Therefore your orator prayes that said defendant be compelled to answer the premises; that each of said deeds be declared illegal, fraudulent, and void as to the debts of your orator.

74 2. That the said tracts of land may be sold under your orator's said judgment and the judgment of the State of Oregon.

3. That the defendant be compelled to deliver up the possession thereof to the purchaser or purchasers, and that they be perpetually enjoined from interfering with the same.

4. That an account be taken of the rents, issues and profits of each of said tracts of land for the last six years, prior to the commencement of this suit.

5. That each of said grantees be compelled to pay rents, issue and profits on the lands severally deeded to each of them.

6th. That said Putnam be compelled to pay your orator the price of the said land deeded to Laura T. Hickethier and interest thereon

from the 8th day of June, 1878, and the price of the wood sold off of said tracts of land, and that he be enjoined forthwith from collecting the balance due for the purchase-money from said Ellensberg.

7. That the paper-writings of said Ellensberg be declared inferior to your orator's liens, or he be compelled to pay your orator the balance due for said purchase.

8. That the defendant pay the costs, expenses of this suit, and for such other and further relief as equity and good conscience may require.

B. F. DOWELL,
Solicitor for Complainant.

XXV. *Note.*

All the defendants are each severally required to answer the interrogatories in the foregoing bill of complaint, numbered respectively from 1 to 2 inclusive.

Charles Putnam and Jonas Ellensberg are each required to answer the interrogatories numbered respectively from 1 to 5 inclusive.

Jesse Applegate is required to answer the interrogatories respectively from 6 to 10 inclusive.

B. F. DOWELL,
Solicitor for Complainant.

75 STATE OF OREGON, } ss:
County of Jackson, }

I, B. F. Dowell, the plaintiff in this suit, make oath that the matters and things stated in the foregoing complaint of my own knowledge are true, and those stated on information I believe to be true. B. F. DOWELL.

Subscribed and sworn to before me———, 1881.

(The foregoing affidavit has a line drawn through it.)

Endorsed: Filed April 6th, 1881. R. H. Lamson, clerk.

76 To the judges of the circuit court of the United States for the district of Oregon, sitting in chancery at Portland, Oregon:

I.

Your orator, B. F. Dowell, a citizen of the State of Oregon and resident of the town of Jacksonville, by leave of the court, brings this his supplemental bill against the following-named citizens of the same State, who reside in Oregon, at the following-named places: Jessie Applegate, Robert Applegate, Alexander Applegate, Sallie Long, and James Fay and —— Long, of Yoncalla; Daniel W. Applegate, Jonas Ellensberg, Peter Applegate, of Drain Station, and Wm. H. H. Applegate, Charles Putnam, of Lake county, Oregon, defendants.

II.

And thereupon your orator complains that on the 11th day of October, 1879, he commenced this suit in the circuit court of the

State of Oregon, for the county of Douglas, and afterwards this suit was removed into this court, and afterwards, on the 6th day of April, 1881, he held a bill of complaint in this court to conform the pleadings to the practice of the United States chancery courts against Jesse Applegate, Cynthia Ann Applegate, Daniel W. Applegate, William Henry H. Applegate, Peter Applegate, Charles Putnam, Charles Drain, John C. Drain, Jonas Ellensberg, and Charles Drain, John C. Drain, and Jonas Ellensberg have appeared in this court and demurred to the last-mentioned bill of complaint, and the court sustained the demurrers as to the said Drains, and overruled it as to the Ellensberg, and all of the defendants to the last-mentioned bill have appeared and answered the same except said Drains.

III.

77 Your orator states that on the — day of June, A. D. 1881, since the commencement of this suit, said Cynthia Ann Applegate died intestate at Yoncalla, Douglas county, Oregon, leaving Jesse Applegate, William Henry H. H. Applegate, Daniel W. Applegate, Peter Applegate, Sallie Long, Charles Putnam, Robert Applegate, Alexander Applegate, ——— Long and James Fay her only heirs-at-law and distributees.

IIII.

That Jesse Applegate was the husband of Cynthia Ann Applegate at the time she died; that Charles Putnam was the only child and heir and distributee of a deceased daughter of Cynthia Ann Applegate, and James Fay is the only child and the only heir and distributee of another deceased daughter of Cynthia Ann Applegate, and all the balance of the defendants are the children of said Cynthia Ann, and the said children and grandchildren of said Cynthia Ann Applegate are each of them the owners of one-ninth of the south half of the donation land claim of Jesse and Cynthia Ann Applegate, lying on Elk creek in Douglas county, State of Oregon, and particularly described in your orator's said bill of complaint.

V.

That James Fay is a minor under the age of 21 years, and he has no guardian.

To the end therefore that the said defendants may, if they can, show why your orator should not have relief prayed for in his said bill of complaint filed in this court on the 6th day of April, 1881—

VI.

Therefore your orator prays that this court appoint a guardian *ad litem* for James Fay; that the United States writ of summons may issue requiring the said Jesse Applegate, William Henry H. Applegate, Daniel W. Applegate, Peter Applegate, Sallie Long, Charles Putnam, ——— Long and James Fay to appear in this

honorable court under a certain penalty therein prescribed and answer the foregoing supplemental bill of complaint.

78 That your orator may have the relief prayed for in said bill of complaint filed the 6th day of April, 1881, and for such other and further relief as may appear according to equity and good conscience.

B. F. DOWELL.
Solicitor for Complainant.

Endorsed: Filed September 12, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

(6.)

That plaintiff in this suit was a party defendant in said suit in the circuit court of the United States for the district of Oregon mentioned in finding No. 5, and appeared therein, and on the 2d day of May, 1881, filed his answer to said amended and supplemental bill of complaint therein as follows:

In the Circuit Court of the United States for the District of Oregon.

B. F. DOWELL, Complainant, *vs.* JESSE APPLEGATE, CYNTHIA ANN Applegate, Sallie Long, Wm. H. H. Applegate, Daniel W. Applegate, Charles Drain, John C. Drain, Jonas Ellensburg, Peter Applegate and Charles Putnam, Defendants.	Suit in Equity Removed from the Circuit Court of the State of Oregon, for Douglas county.

Now comes the defendant, Daniel W. Applegate above-named, by W. Carey Johnson and Binger Herman, his attorneys, and answering for himself separately, and not for the other defendants or any of them, and defends against the wrongs and injuries alleged

79 by the complainant in his bill of complaint exhibited against him in said circuit court of the United States, and says that the complainant ought not to have the relief prayed for in his said bill, nor any relief whatever, and this defendant, as in duty bound to admit or deny the matters alleged against them in said bill, respectfully *show* and *state* to the court—

That as to the matters alleged in the 2d, 3d, 4th, 5th and 6th paragraphs or divisions thereof he admits them to be true.

And as to the matter alleged in the 7th paragraphs or subdivision of said bill this defendant admits the same to be true except as to the amount of the costs in the said action of B. F. Dowell in the circuit court of the State of Oregon against Jesse Applegate, and denies that the said costs and disbursements of said action amounts to the sum of $146.69, and denies that Jesse Applegate was indebted to the said complainant in the aggregate sum of $6,584.09 on the 1st day of Jan., 1881, or that he owed the complainant any greater

sum than $284.61, with interest since May 31, 1879, and $1,972.04, with interest since June 27th, 1878.

And as to the matters alleged in the 8th paragraph or subdivision of said bill this defendant admits the same to be true.

But alleges and shows that the judgment therein referred to in favor of the State of Oregon against Jesse Applegate was, before the commencement of this suit, wholly paid and satisfied out of the real property of the said Jesse Applegate, situate in Douglas county, Oregon.

And as to the matters alleged in the 9th paragraph or subdivision of said bill this defendant admits them all to be true except that he denies that at the time of the alleged grievances in said bill mentioned or at any other time the defendant, Jesse Applegate, had a life estate or any estate whatever in the south half of the donation land claim in said paragraph described as Jesse Applegate's, donation land claim No. 38, notification No. 452, certificate 103, in T. 22 S., R. 5 west of the Willamette meridian,
80 or that he had ever at any time any estate whatever in any part of said south half of said claim; but alleges that the said south half of said donation claim has at all times since the grievances mentioned in said complaint belonged to the said Cynthia Ann Applegate in her own right, and was not at any time subject to the debts of her said husband.

And as to the matters and things alleged in the 10th paragraph or subdivision of said complainant's bill denies that the defendant Jesse Applegate, and his wife, Cynthia Ann Applegate, or either of them, to delay, cheat, or defraud either the State of Oregon or the complainant or any one out of said debts, deeded the said lands or any lands to their children or any of them to any person.

Denies that the defendant Jesse Applegate, and Cynthia Ann Applegate, to delay, cheat, or defraud the State of Oregon and the complainant or either of them, or to delay, cheat, or defraud any one, deeded to this defendant 160 acres of Jesse Applegate's part of said donation land claim by deed dated 6th April, 1867, or any other land.

Denies that the lands conveyed by the said deed of April 6th, 1867, from Jesse Applegate and Cynthia Ann Applegate, his wife, to this defendant conveys or purports to convey any part of Jesse Applegate's part of said donation land claim, and denies that the consideration named in said deed was an apparent consideration.

But alleges that the whole of said land conveyed by both of said deeds to this defendant is situate in the southeast part of Cynthia Ann Applegate's half of said donation land claim, except a small piece which lies south of said claim, and said deeds were made and delivered to this said defendant for a good, valuable, and sufficient consideration, for and in consideration for services rendered by this defendant to the said Jesse Applegate and Cynthia Ann Applegate, his wife, under and in pursuance of a contract and agreement made long prior to the time when the said Jesse Applegate became liable to the State of Oregon, in any sum whatever, and before this

defendant had any knowledge of any indebtedness of the
81 said Jesse Applegate upon either of the bonds mentioned in complainant's bill.

And as to the matter alleged in the 12th paragraph or subdivision of said bill against this defendant, denies that either of said deeds are or were illegally recorded in the county clerk's office of Douglas county, State of Oregon, and denys that the recording of either of them is a void act, but on the contrary, alleges that he in good faith caused each of said deeds to be legally recorded in the records of said county.

And as to the matters alleged in the 13th paragraph or subdivision of said bill against this defendant, denies that he took and received said deeds, or either of them, with intent to delay, defraud or cheat the State of Oregon or the complainant out of said debts or any debts, or with intent to delay, cheat and defraud any one.

Denies that the time he received the said deeds, or either of them, he had notice that the said Jesse Applegate was largely indebted to the State of Oregon as surety of S. E. May on said bonds; or that he had notice that he was indebted on said bonds, or either of them, until long after said deeds had been received by him, and that he knew that the giving of said deeds, or either of them, would make the said Jesse Applegate insolvent.

And denies that the making of either of said deeds did make the said Jesse Applegate insolvent.

And as to the matters alleged in the 14 paragraph against this defendant, denies that the deed to him dated in 1867 was antedated to deceive, cheat, delay or defraud the State of Oregon or the complainant out of said debts or any debt, or to deceive, cheat, delay or defraud any one.

And denies that said deed was antedated at all.

And denies that said deed was not made or delivered until Feb., 1869.

But allege that said deed was made and delivered in 1867. Denies that said land was at the time it was deeded to this defendant worth the sum of $20 per acre, or any sum greater than $10 per acre; denies that his said deeds were made without any valuable
82 consideration, and denies that the money consideration named in his said deed was false or fictitious, and denies that said deeds or either of them was made or delivered or received by this defendant with any intention to deceive, cheat, delay or defraud the creditors of Jesse Applegate, or the complainant, or any one.

And as to the matters alleged in the 15th paragraph of said bill against this defendant, denies that his said deeds, or either of them, are or were constructively or otherwise fraudulent as to the State of Oregon, or the debts of complainant, or any one; and denies that either of his said deeds were made or delivered by Jesse Applegate to the recorder of Douglas county, Oregon, without any valuable consideration, or at all, but delivered each of said deeds to this defendant for a good and valuable consideration; and denies that he, the said Jesse Applegate, knew at the time he delivered the said

deeds, or either of them, to this defendant, that it would make him insolvent, or that it did make him, the said Jesse Applegate, insolvent; but alleges that at the time of making and delivering each of said deeds to this defendant, the said Jesse Applegate had other real and personal property amply sufficient — all his debts and liabilities, including his liabilities on said bond.

And deny that the balance of his property consisted of a few cattle and wild hilly lands wholly inadequate to pay all his debts.

Admits that he has no goods, chattels, lands or tenements to pay complainant's debt, but alleges that his reduced circumstances is owing to disasters to his property, and to business failures on the part of his debtors, happening since the said deeds were made and delivered to this defendant.

Admits the issuing and return of said executions.

And as to the matters alleged in the 17th paragraph of said bill against this defendant, denies that his said deeds, or either of them,

are illegal or fraudulent, or a fraud under the statutes of the
83 United States or any statute relating to internal revenue, and denies that the consideration was expressed in either of the said deeds either by this defendant or the grantees with any intent of evading the provisions of said statute or any statute.

Denies that this defendant knew at the date of said deeds, or either of them, that the lands conveyed by each of said deeds *was* worth in cash more than $1,000.

Admits that each of his said deeds had only a stamp of 50 cents but alleges that said stamps were put on each of said deeds in good faith and without any intent to evade the requirements or provisions of the statute of the United States.

Denies that the recording of said deeds was in violation of the spirit or meaning of sections 152–156–158 of said statute.

Denies that said stamps have not been cancelled by writing the dates when the deed was so used, or stamps affixed on the same or the initials of the persons using them prior to placing them on record, but *alleges* that the said stamp on each of said deeds had, at the time the same was executed and the said stamps affixed thereto, the date thereof plainly written thereon, and also the names of Jesse Applegate and Cynthia Ann Applegate written across the said stamp as required by said act of Congress; and as to the matters alleged in the 20th paragraph against this defendant, denies that either of his said deeds are a cloud upon the title of Jesse Applegate to the said lands, or that he, the said Jesse Applegate, has any right or title to the land described in said deeds or either of them, or that said deeds depreciate the value of said land.

And denies that his said deeds depreciate any lien of the complainant's, or that the complainant has any lien on the said lands, or any part thereof.

84 And as to the matters alleged in the 21st paragraph of said bill, admits that he has had the possession of the land described in his said deeds for more than six years last past; but denies that said land is of the value of one dollar and 25 cts. per acre for

each year, or of any greater than fifty cents for each year, and denies that he has within the last six years made any profit from the said land.

But alleges that he has paid out and expended upon said land in repairs and permanent improvements a much greater sum than the net profits which he has received therefrom. And to the questions propounded in and by said bill of complaint, to be answered by the defendant, he answers questions 1 and 2 as follows, respectively:

That the complaint is true so far as admitted by him in the foregoing answer and no further; that so much of said complaint is false as is denied, and fully shown so by particulars in the foregoing answer.

And now having fully answered, admitting, denying, or avoiding all the allegations of complainant's bill aforesaid, this defendant asks to be dismissed with his costs and disbursements.

W. CAREY JOHNSON,
BINGER HERMAN,
of Counsel of Def't.

STATE OF OREGON, }
County of Douglas, } *ss:*

I, D. W. Applegate, do solemnly swear that I am one of the defendants above named and make the foregoing answer; that the same has been read to me, and I know the contents thereof and that the foregoing answer is true.

D. W. APPLEGATE.

Subscribed and sworn to before me this 29 of April, 1881.

C. GADDIS,
U. S. Commissioner.

85 Endorsed: Filed May 2, 1881. R. H. Lamson, clerk.

86 That on the 5th day of January, 1883, said circuit court of the United States for the district of Oregon, after hearing the allegations of the parties, evidence and argument of counsel made and entered of record in the suit mentioned in finding No. 5, the following decree:

In the Circuit Court of the United States for the District of Oregon.

B. F. DOWELL
vs.
JESSE APPLEGATE, CYNTHIA ANN APPLEGATE, WILLIAM Henry H. Applegate, David W. Applegate, Charles Putnam, Peter Applegate, Sallie Long, Robert Applegate, James Fay, Charles Drain, John C. Drain, Jonas Ellensberg, Alexander Applegate, —— Long, husband of Sallie Long. } No. 683.

JANUARY, 5TH, 1883.

Now at this day this cause comes on to be heard on the bill, answers and replication thereto, together with the evidence and the opinion heretofore filed herein by the circuit judge, the Honor-

able Lorenzo Sawyer, the plaintiff appearing in his own proper person and the defendant by Mr. W. Carey Johnson, and was argued by counsel, *and*, and thereupon, on consideration thereof, it is ordered, adjudged and decreed that on and prior to April 19, 1869,
87 the defendant, Jesse Applegate, and the plaintiff were jointly and severally liable to the State of Oregon in the sum of five thousand and five hundred and forty-six dollars, as sureties on the official bond of August 4th, 1866, of Samuel E. May, secretary of state for the State of Oregon, by reason of the defalcation of said secretary, contrary to the conditions of his bond, which sum was equal to the value of all the property and assets then owned and possessed by said Jesse Applegate.

That on June 27, 1878, the plaintiff herein obtained a judgment against the defendant, Jesse Applegate, in the circuit court of the State for the county of Douglas, for the sum, inclusive of costs, of five thousand dollars and twenty-eight dollars and sixty eight cents, that being the amount then due from said Jesse Applegate to the plaintiff herein on account of money theretofore paid by said plaintiff to the State of Oregon in satisfaction of said defalcation, and in discharge of their liability under said bond.

That afterwards, on November 16, 1878, the plaintiff paid the State of Oregon the sum still remaining due on account of the defalcations under said bond, to wit:

The sum of $1,385.64, whereby said Jesse Applegate became, and was then and there liable to repay the plaintiff the half of said last-mentioned sum, of which indebtedness the sum of two hundred and eighty-four dollars and sixty-one cents, on May 31, 1879, remains unpaid.

That both said sums of money are still due and unpaid, with interest thereon at ten per centum per annum until January 25, 1881, and thereafter at the rate of eight per centum per annum, making in all the sum of $7,488.48, for which first-mentioned sum and interest thereon, by virtue of the judgment first aforesaid, the plaintiff has a lien upon all the real property of said Jesse Applegate situate in the county of Douglas aforesaid, from and since the entry and docketing of said judgment.

That on and prior to April 19, 1869, said Jesse Applegate was the owner in fee simple of one thousand and twenty-one and 55-100 acres of the north half of the donation claim numbered thirty-eight, being part of township 22 south, of range 5 west of the Willamette meridian, and situated in Douglas county aforesaid, the same
88 more or less being the whole of said north half except the portion, being two hundred acres more or less, conveyed by Daniel W. Applegate on June 24th, 1871, to Charles and John C. Drain, and that the conveyance of said 121 and 85-100 acres by said Jesse Applegate to his sons William H. H. Applegate and Daniel W. Applegate by deeds dated April 19 and 20, 1869, respectively, was voluntary and without valuable consideration and in fraud of the rights of the plaintiff herein, and is therefore as against him and his assigns declared to be null and void.

That on and prior to April 20, 1869, said Jesse Applegate was seized and possessed of an estate for his own life in the south half of said donation claim except about one hundred and forty-six acres thereof, conveyed by him to Daniel W. Applegate by deed dated April 6th, 1867, and that the conveyance of the remaining portion thereof, being 225 acres more or less, by said Jesse Applegate to his sons Daniel W. Applegate and Peter Applegate, by deeds dated April 20 and 21, 1869, respectively, was voluntary and without valuable consideration and in fraud of the rights of the plaintiffs herein, and is therefore as against him and his assigns declared to be null and void.

That on and prior to April 21, 1869, said Jesse Applegate was the owner in fee simple of the northwest quarter of the northwest quarter of section 28 in township 22 south of range 5 west of the meridian aforesaid, containing 40 acres; also the southeast fractional quarter of the southwest quarter of section 28, township 22 south, of range 5 west of the meridian aforesaid, containing one and thirty-one hundredths acres, and that the conveyance thereof by said Jesse Applegate on April 21, 1869, to his son Peter Applegate was voluntary and without valuable consideration and in fraud of the rights of the plaintiff herein, and is therefore as against him and his assigns declared to be null and void.

That on and prior to December 2, 1871, said Jesse Applegate was the owner in fee simple of the north half of the southwest quarter and the south half of the northwest quarter of section 23, township 23 south, of range 5 west of the meridian aforesaid, containing 160 acres, and that the conveyance thereof by said Jesse Apple-
89 gate on the day and year last aforesaid to his daughter Sallie Applegate, since intermarried with —— Long, was voluntary and without valuable consideration and in fraud of the rights of the plaintiff herein, and is therefore declared to be null and void.

That unless the defendant Jesse Applegate, Peter Applegate, Daniel W. Applegate, William H. H. Applegate and Sallie Applegate pay the sum of $7,488.48 as aforesaid, to the plaintiff herein, together with his costs and disbursements herein to be taxed within twenty days from the entering of this decree, the master of this court, Mr. William B. Gilbert, is authorized and required to sell, as upon an execution at law, all the interest of said Jesse Applegate, on January 1st, 1869, in the above-mentioned and described premises, to wit:

The 125 85-100 acres, more or less, situate in the north half of the said donation claim numbered 38 as aforesaid, all of the south half of said donation except the 146 acres more or less conveyed to Daniel W. Applegate as aforesaid, the 41 31-100 in section 28, township 20 south, of range 5 west of the meridian aforesaid, and conveyed to Peter Applegate as aforesaid; and the 160 acres in section 23, township 23 south, of range 5 west of the meridian aforesaid, and conveyed to Sallie Applegate as aforesaid, and after paying the costs and expenses of said sale and the making of conveyances to

the purchaser or purchasers thereat, that he bring the remainder of the proceeds into court with a report of his doings in the premises.

That the purchaser or purchasers at said sale be entitled to the possession of the premises purchased by them upon the receipt of the master's conveyance therefor, and to have all proper process from this court to put them into such possession.

That the plaintiff have execution against the defendants last aforesaid to recover any portion of his costs and expenses herein remaining unpaid after the sale of said premises and the distribution of the proceeds thereof.

That the conveyance by Jesse Applegate to Charles Putnam on April 19, 1869 of 240 acres, more or less, in township 22 south, of range 5 west of the meridian aforesaid was made in good faith and upon a valuable consideration and is valid as against this
90 plaintiff, and therefore the bill is dismissed as to said Putnam and his grantee, Jonas Ellensberg, and they and each of them are entitled to recover their costs and expenses to be taxed from plaintiff, and to have execution therefor, if the same are not paid within 20 days from the entry of this decree.

That the conveyance by said Jesse Applegate to William H. H. Applegate on April 6th, 1867, of 161 acres, more or less, in the north half of said donation land claim numbered 38 and the conveyance by him to his son, Daniel W. Applegate, on April 6th, 1867, of 146 acres, more or less, in the south half of said donation claim numbered 38, were made in good faith when the grantor was otherwise well able to meet his pecuniary obligations, and are therefore valid as against the plaintiff herein, and so far the bill is dismissed as against the defendant, William H. H. Applegate, and Daniel W. Applegate; and that as to all the other defendants not herein as heretofore disposed of the bill is dismissed without costs.

DEADY, *J.*

Complainant's costs taxed at $808.82.

R. H. LAMSON, *Clerk.*

Endorsed: Filed Jan. 5th, 1883. R. H. Lamson, clerk: by G. G. Gammans, deputy clerk.

91 (8.)

That in pursuance of said decree mentioned and set out in finding No. 7. W. B. Gilbert, the master in chancery of said circuit court of the United States for the district of Oregon, duly advertised according to law the premises in said decree described for sale at public auction to the highest bidder at the hour of one o'clock in the afternoon on the 26th day of April, 1883, at the court-house door in Douglas county, Oregon, and at said time and place offered said premises for sale at public auction to the highest bidder, and thereupon the defendant in this suit, B. F. Dowell, bid therefor the sum of $7,400, that being the highest and best bid offered therefor, and said master in chancery accordingly struck off and sold the same to said B. F. Dowell.

(9.)

That on June 4, 1883, said sale was in all things confirmed by said circuit court of the United States for the district of Oregon and said master in chancery was ordered and directed to execute and deliver to this defendant a proper conveyance for said property.

(10.)

That in pursuance to said sale and order of confirmation said master in chancery did, on the 6th day of December, 1883, duly execute and deliver to said defendant, B. F. Dowell, a conveyance of said property, which said deed was duly recorded in the records of deeds for Douglas county, Oregon, on the 19th day of August, 1884.

(11.)

That the tract of land described in the complaint in this suit and in finding No. 3 herein is a part of and included in the premises mentioned and described in the said suit of B. F. Dowell against Jesse Applegate *et al.* and the decree therein, and also in the deed from W. B. Gilbert, the master in chancery of said circuit court of the United States for the district of Oregon, as executed and delivered to said B. F. Dowell.

(12.)

92 That no evidence was offered or admitted sustaining or tending to sustain the allegations in the answer of defendant "that the plaintiff and his brother William H. H. Applegate at the time the deed of Jesse Applegate to William Henry H. Applegate, and pretended deed from William Henry H. Applegate to plaintiff, well knew that Jesse Applegate was largely indebted to the State of Oregon as one of the sureties of S. E. May, late secretary of State, and both of said deeds were made with the intent to cheat and defraud the State of Oregon and B. F. Dowell, one of Jesse Applegate's co-sureties, out of said debt.

"That the said Wm. H. H. Applegate and Daniel W. Applegate received said deeds with the intent to cheat, delay, and defraud the State of Oregon and B. F. Dowell out of said debt.

"That both of said deeds were made and delivered to Wm. Henry H. Applegate and Daniel W. Applegate without any valuable consideration whatever.

"That the deed of Wm. H. H. Applegate to his brother Daniel W. Applegate was made and delivered without any valuable consideration whatever," or any of said allegations, and I therefore find that said allegations and each and every one of them are untrue.

As conclusions of law I find, first—

That the deed of W. B. Gilbert, master in chancery of the circuit court of the United States for the district of Oregon, mentioned in my 10th finding of fact, conveyed no title or interest to the said defendant in or to the real property described in the complaint in this suit.

Second. That plaintiff is entitled to a decree declaring the claim

of defendant to said land of no binding force and effect, and perpetually enjoining and restraining him and all persons claiming under, by or through him, from asserting or attempting to assert any claim to or interest in said premises or any part thereof, and for his costs and disbursements in this suit expended.

Dated this 12th day of May, 1888.

R. S. BEAN, *Judge.*

93 It is therefore ordered and decreed by the court that the plaintiff, Daniel W. Applegate, have and recover a judgment against defendant, B. F. Dowell; that his claim to the following property, to wit: A part of the donation claim of Jesse Applegate, claim No. 38, Not. No. 542 of township 22 S., of R. 5 west, beginning at the southwest corner of the tract of land heretofore sold by Wm. Henry H. Applegate to Charles Drain; thense south 31° 20′ W. along the original boundary of claim No. 38, seven chains and forty-three links to the southwest corner of the tract of land sold to Wm. Henry H. Applegate by Jesse Applegate and Cynthia Ann Applegate, his wife; thence north 89° 15′ E., along the north boundary of the lands of Peter S. and Daniel W. Applegate sixty-three (63) chains to Wm. Henry H. Applegate's southeast corner; thence north 31° 20′ east, 7 chains and 43 links to Charles Drain's southeast corner; thence south 89° 15′ W., along Drain's line sixty-three chains to the place of beginning, containing 40 acres in Douglas county, Oregon, is of no binding force and effect, and that he be perpetually enjoined and restrained, him and all other persons claiming under, by, or through him, from asserting or attempting to assert any claims to or interest in said premises or any part thereof, and for the costs and disbursements in this suit expended, taxed at $———, and that execution issue therefor.

(Record signed) R. S. BEAN, *Judge.*

Attest: T. R. SHERIDAN, *Clerk.*

94 In the Circuit Court of the State of Oregon for the County of Douglas.

DANIEL W. APPLEGATE, Plaintiff, *vs.* B. F. DOWELL, Defendant. } Suit in Equity. Notice of Appeal

Notice of Appeal.

To Daniel W. Applegate, and to his attorney, J. W. Hamilton:

You will take notice that the defendant in the above-entitled suit hereby appeals to the supreme court of the State of Oregon, said court to be begun and held at Salem, Oregon, on the 1st Monday in October, 1888, from the decree therein made in the said suit and court on the 14th day of May, 1888, in favor of the plaintiff in said suit against said defendant and from the whole thereof.

Dated this 12th day of June, 1888.

JAS. F. WATSON AND
B. F. DOWELL,
Att'ys for Defendant.

95 In the Circuit Court of the State of Oregon for Douglas County.

D. W. APPLEGATE, Plaintiff,)
vs.
B. F. DOWELL, Defendant.)

STATE OF OREGON,)
County of Douglas,) *ss.*

I hereby certify that I have served the within notice of appeal within said State and county on the 21st day of June, 1888, on the within names J. W. Hamilton, the attorney for the plaintiff in the above-named court and cause, by delivering to the said J. W. Hamilton in person a copy thereof prepared and certified to by B. F. Dowell, one of the attorneys for defendant herein.

Dated 21st day of June, 1888.

B. C. AGEE, *Sheriff.*
By S. C. MILLER, *Deputy.*

96 Endorsed: In the circuit court of the State of Oregon for the county of Douglas. D. W. Applegate, pl'ff, *vs.* B. F. Dowell, def't. Notice of appeal. J. F. Watson and B. F. Dowell, att'ys for defendant. Filed June 21, 1888. T. R. Sheridan, county clerk, by W. T. Wright, deputy clerk.

97 In the Circuit Court of the State of Oregon for Douglas County.

DANIEL W. APPLEGATE, Plaintiff,)
vs.
B. F. DOWELL, Defendant.) Undertaking on Appeal in Equity.

Undertaking on Appeal.

Whereas the B. F. Dowell, defendant in the above-entitled suit, appeals to the Supreme Court of the State of Oregon from a decree made and entered against him in the said suit in the said circuit court in favor of the plaintiff in the said suit, on the 14th day of May, A. D. 1888, for forty acres of land described in the complaint, and for the costs and disbursements of said suit:

Now therefore, in consideration of the premises and of such appeal, we the undersigned, B. F. Dowell, principal, of the county of Multnomah, State of Oregon, and Anna E. Dowell, of the county of Multnomah, State of Oregon, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages, costs and disbursements which may be awarded against B. F. Dowell on the appeal.

And whereas, the appellant is desirous of staying the execution of the said decree so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise that if the said decree appealed from, or any part thereof, be affirmed, the appellant will satisfy it so far as affirmed.

B. F. DOWELL.
ANNA E. DOWELL.

98 STATE OF OREGON, } ss:
County of Multnomah, }

I, Anna E. Dowell, whose name is subscribed to the within undertaking as surety, being duly sworn, says: That I am a resident and free of land in fee simple holder within the State of Oregon, and am*m* not a counselor or attorney at law, sheriff, clerk, or other officer of any court, and am worth the sum of five hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

ANNA E. DOWELL.

Subscribed to and sworn to before me this 15th day of June, A. D. 1888.

C. W. MILLER,
[SEAL.] *Notary Public for Oregon.*

99 Endorsed: In the circuit court of the State of Oregon for the county of Douglas. Daniel W. Applegate, plaintiff, *vs.* B. F. Dowell, defendant. Undertaking on appeal. Filed this 21st day of June, 1888. T. R. Sheridan, clerk, by W. T. Wright, deputy clerk.

100 STATE OF OREGON, } ss:
County of Douglas, }

Clerk's Certificate to Circuit Court.

I, T. R. Sheridan, county clerk of Douglas county, Oregon, and clerk of the circuit court of the State of Oregon for Douglas county, Oregon, do hereby certify that the foregoing is a full, true and correct copy of the pleadings, orders, papers and journal entries that constitute the judgment roll in the case of Daniel W. Applegate, plaintiff, *vs.* B. F. Dowell, defendant, in said circuit court, together with the notice of appeal and undertaking on appeal, and that I have compared said copy of the pleadings, orders, papers and journal entries constituting such judgment roll and the notice of appeal and undertaking on appeal with the original thereof on file and of record in this office, and that the same are full, true and correct copies thereof, and the whole thereof.

In witness whereof, I have hereunto set my hand and official seal, July 2d, 1888.

[SEAL.] T. R. SHERIDAN, *Clerk.*

101 In the Circuit Court of the State of Oregon for the County of Douglas.

D. W. APPLEGATE } ss:
vs.
B. F. DOWELL. }

The only questions is as to whether the plaintiff is concluded by the decree in evidence. Plaintiff was a party. The decree directly

determines that the deed to W. H. H. Applegate, under which he claims, was voluntary, and void as to Dowell.

We cite:

Code, § 723, sub. 2; *Id.*, sub. 1.
Barrett *vs.* Failing, 8 Or., 152.
1 Greenleaf on Ev., §§ 523–528–532.
Bigelow on Estoppel, 110; also, note 1.

The suit of Dowell *vs.* Applegate was brought to declare the deed to W. H. H. Applegate, under which plaintiff claims, voluntary, fraudulent and void as to the judgment of Dowell, and to subject the lands in dispute in this suit, with other lands, to the satisfaction of that judgment. Plaintiff in this suit was made a defendant in that. Whatever defense he had to the relief sought in that suit it was his duty to interpose.

If he had bought part of it in good faith from Wm. H. H. Applegate for a valuable consideration, that was a defense, and had he interposed it and proven it, while the deed to W. H. H. —, under which he claims, would still have been held void, his rights as a *bona-fide* purchaser would have been protected.

He made no such defense. The deed of W. H. H. — was decreed void, and the land in dispute decreed sold, and sold to pay Dowell's judgment.

102 Now he comes in by a bill in equity to attack that decree and deed, for the reason that he failed to make *his* defense he ought to have made in that suit.

WATSON, HUME & WATSON,
Att'ys for Defendant.

103 Endorsed: Filed Oct. 1, 1888. W. H. Holmes, clerk.

104 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court room, in the city of Salem, on the 1st Monday, the first day, of October, 1888—

Present: Hon. William Wallace Thayer, chief justice; Hon. Reuben S. Strahan, associate justice; Hon. William P. Lord, associate justice, and W. H. Holmes, clerk—the following proceedings were had on Wednesday, the 16th day of Jan., 1889, the same being the 47 judicial day of said term:

DANIEL W. APPLEGATE, Respondent,
vs.
B. F. DOWELL, Appellant. } Appeal from Douglas Co.

This cause having been heretofore duly argued and submitted and taken under advisement by the court, and now the court being fully advised in the premises finds there is not error as alleged.

It is therefore ordered and adjudged by the court that the judgment of the lower court, from which this appeal was taken, be, and the same is hereby, affirmed.

And said decree of the circuit court is ordered to stand as the decree of this court in that behalf entered.

And further ordered that respondent recover of and from appellant and Anna E. Dowell, his surety on appeal, his costs and disbursements of this appeal, herein allowed and taxed at $42.50.

And also the costs and disbursements of the court below to be there taxed.

And also ordered that said cause be remanded to the court below, and that a judgment be there entered of record and docketed in accordance herewith.

105 STATE OF OREGON, } ss:
Marion County, }

I, W. H. Holmes, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record in my office and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Salem, Oregon, this 4th day of Feb., 1889.

[SEAL.] W. H. HOLMES, *Clerk.*

To the circuit court of the State of Oregon for the county of Douglas:

You are hereby commanded that of the above judgment order of our supreme court, you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 4th day of Feb., 1889.

W. H. HOLMES,

[SEAL.] *Clerk of said Supreme Court.*

106 STATE OF OREGON, } ss:
County of Marion. }

I, W. H. Holmes, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing copy of affidavit for injunction, answer, complaint, decree of circuit court, demurrer to answer, decree in circuit court, decree in supreme court, entry withdrawing demurrer to answer, entry overruling motion to make answer definite, entry overruling demurrer to answer, entry overruling application for reference, entry overruling motion to strike out answer and complaint, entry submitting cause, motion to make complaint more definite, motion to make answer more definite, notice of appeal 1st, notice of appeal June 28, '88, reply, undertaking for injunction, undertaking on appeal, undertaking on appeal 2d, undertaking on appeal June 21, '88, decree of supreme court, clerk's certificate circuit court and clerk's certificate supreme

court, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and in my office and custody, and that such papers constitute the final judgment-roll and record in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 24th day of December, 1889.

[SEAL.] W. H. HOLMES, *Clerk*.

107 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 1st day, of Oct., 1888—present: Hon. William Wallace Thayer, chief justice; Hon. Reuben S. Strahan, associate justice; Hon. William P. Lord, associate justice, and W. H. Holmes, clerk—the following proceedings were had on Wednesday, the 16th day of Jan., 1889, the same being the 47*th* judicial day of said term:

DANIEL W. APPLEGATE, Respondent, }
vs. } Appeal from Douglas county.
B. F. DOWELL, Appellant. }

This cause having been heretofore duly argued and submitted and taken under advisement by the court, and now the court being fully advised in the premises, finds there is not error as alleged.

It is therefore ordered and adjudged by the court that the judgment of the lower court from which this appeal was taken be and the same is hereby affirmed.

And said decree of the circuit court is ordered to stand as the decree of this court in that behalf entered.

And further ordered that respondent recover of and from appellant and Anna S. Dowell, his surety on appeal, his costs and disbursements of this appeal, herein allowed and taxed at $42.50.

And also the costs and disbursements of the court below to be there taxed, and also ordered that said cause be remanded to the court below and that a judgment be there entered of record and docketed in accordance herewith.

108 STATE OF OREGON, } ss:
Marion County, }

I, W. H. Holmes, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and in my office and custody.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 4th day of Feb., 1889.

[SEAL.] W. H. HOLMES, *Clerk*.

To the Circuit Court of the State of Oregon, for the county of Douglas:

You are hereby commanded that of the above judgment order of our supreme court you cause proper entry to be made upon the records of your court as of a judgment thereof, and proceed to final determination and execution thereof as to the said order of our supreme court and to law and justice shall appertain.

In witness hereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 4th day of Feb., 1889.

W. H. HOLMES,
[SEAL.] *Clerk of said Supreme Court.*

109 Endorsed on back as follows: No. 4011. Box 103. In the supreme court of the State of Oregon. —— term, 188— Daniel W. Applegate, Resp., *vs.* B. F. Dowell, App. Filed Oct. 1, 1888. ——, clerk.

110 In the Supreme Court of the State of Oregon.

B. F. DOWELL, Plaintiff in Error; *vs.* DANIEL W. APPLEGATE, Defendant in Error.	Decision in favor of Daniel W. Applegate on 16th day of January, 1889.

To the Honorable W. W. Thayer, chief justice of the supreme court of the State of Oregon:

Now comes B. F. Dowell, in his proper person, & by J. F. Watson, his attorney, and complains that in the record and proceedings, and also in the rendition of the order and decree in a suit between Daniel W. Applegate, plaintiff, and B. F. Dowell, defendant, in supreme court of the State of Oregon, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final order and decree was rendered against him on the 16th day of January, 1889, in said suit, wherein it appears:

I. The State circuit court erred in striking out the second defense of B. F. Dowell set up in the answer.

111 II. The State supreme court erred disregarding the jurisdiction of the United States circuit court, which is shown by the allegations in the complaint of B. F. Dowell and the answer of Daniel W. Applegate about the stamp act of Congress and the insufficient stamps on the deed of the defendants in the case of B. F. Dowell against Jesse Applegate, Wm. H. H. Applegate, Daniel W. Applegate, Peter Applegate, Sallie Long and others, and the decree therein against said defendants described in the record.

III. The supreme court of the State of Oregon erred in giving any validity to the deed from Wm. H. H. Applegate to Daniel W. Applegate, because Daniel W. Applegate had said deed prior to and during the pendency of the suit of B. F. Dowell against him in the said U. S. court, and he neglected to plead or set up said deed

in this suit, and Dowell only had constructive notice of the deed prior to his purchase of the land in dispute under the decree of the United States circuit court.

112 IV. The supreme court of the State of Oregon erred in reversing the first decree of the circuit court of the State of Oregon for the county of Douglas.

V. The supreme court of the State of Oregon erred in confirming the second decree of the circuit court of the State of Oregon for the county of Douglas.

The last-described decision should have ordered the dismissing of the complaint, the injunction dissolved, and a decree in favor of B. F. Dowell for the costs, expenses, and disbursements of the suit, all of which appears in the record and proceedings in said suit. Manifest error hath happened to the great damage of the said B. F. Dowell, wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

B. F. DOWELL AND
J. F. WATSON,
Attorneys for Petitioners.

113 I hereby allow a writ of error as prayed for in the within petition.

Dated this January 2, 1890.

W. W. THAYER,
Chief Justice of the Supreme Court of the State of Oregon.

[Endorsed:] B. F. Dowell, plaintiff in error, *vs.* Daniel W. Applegate, defendant in error. Petition for a citation.

114 *Bond.*

Supreme court of the United States.

B. F. DOWELL, Plaintiff in Error
vs.
DANIEL W. APPLEGATE, Defendant in Error.

Know all men by these presents, that we, B. F. Dowell, Anna E. Dowell, and N. A. Dowell, of Portland, Oregon, are held and firmly bound unto Daniel W. Applegate, of Douglas county, State of Oregon, in the sum of five hundred dollars, to be paid to the said Daniel W. Applegate, his executor or administrator. To which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 28th day of December, 1889.

Whereas the above-named B. F. Dowell hath prosecuted a writ of error in the supreme court of the United States to reverse the
115 order and judgment rendered in the above-entitled action by the supreme court of the State of Oregon:

Now, therefore, the condition of this obligation is such that if the

above-named B. F. Dowell shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good this plea, then this obligation shall be void; otherwise to remain in full force and virtue. Sealed and delivered in the presence of

B. F. DOWELL. [SEAL.]
N. A. DOWELL. [SEAL.]
ANNA E. DOWELL. [SEAL.]

We, B. F. Dowell, N. A. Dowell, and Anna E. Dowell, each for himself and herself, after being duly sworn, testify as follows:

I am a house-holder and free-holder in the State of Oregon and I am worth a thousand dollars over and above all my debts and liabilities and property exempt from execution; and I reside in Multnomah county, Oregon.

B. F. DOWELL.
N. A. DOWELL.
ANNA E. DOWELL.

Sworn to and subscribed before me 28th Dec., 1889.

A. V. BEACH,
Notary Public for Oregon.

[SEAL.]

116 STATE OF OREGON, } ss:
City of Salem. }

I hereby approve of the within and foregoing bond and of the sufficiency of the sureties therein named, and who executed the same.

Dated January 2d, 1890.

W. W. THAYER,
Chief Justice, Supreme Court, State of Oregon.

[Endorsed:] B. F. Dowell, plaintiff in error, *vs.* Daniel W. Applegate, defendant in error. Bond.

117 UNITED STATES OF AMERICA, ss:

To Daniel W. Applegate, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 1st Monday in October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the United States, wherein B. F. Dowell is plaintiff and you are defendant in error, to show cause, if any there be, why the order and judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. W. Thayer, chief justice of the supreme court of Oregon, this day, twenty-eighth of December, in the year of our Lord one thousand eight hundred eighty-nine.

W. W. THAYER,
Chief Justice of the Supreme Court of the State of Oregon.

118 Service of this citation within written upon me is admitted *upon me* as attorney for Daniel W. Applegate, defendant in error therein named, in Multnomah county, State of Oregon, this 7th day of April, A. D. 1890.

R. WILLIAMS,
One of Attorneys for D. W. Applegate, Defendant in Error.

[Endorsed:] B. F. Dowell, plaintiff in error, *vs.* Daniel W. Applegate, defendant in error. Citation.

119 STATE OF OREGON, } ss.
County of Marion, }

I, E. R. Shipworth, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original as the same appears of record and in my office and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 15th day of August, 1890.

[SEAL.] E. R. SHIPWORTH, *Clerk.*

120 In the Supreme Court of the United States.

B. F. DOWELL, Plaintiff in Error, }
vs. } No. —. Writ of Error.
DANIEL W. APPLEGATE. }

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the Supreme Court of the State of Oregon, greeting:

Because of the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before the Honorable W. W. Thayer, R. S. Strahan, and W. P. Lord, between Daniel W. Applegate, plaintiff and defendant in error, and B. F. Dowell, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. eighteen hundred and ninety, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein

to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this August 20, 1890.

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon.

[SEAL.]

By R. B. LAMSON,
Deputy Clerk.

Allowed, August 27th, 1890.

R. S. STRAHAN,
Chief Justice Supreme Court of Oregon.

121 [Endorsed]: In the Supreme Court of the United States. B. F. Dowell *vs.* D. W. Applegate. Writ of error. Filed —, 188—. ——, clerk, by ——, deputy clerk.

122 STATE OF OREGON, } ss.
County of Marion. }

I, E. R. Shipworth, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 1st day of Sept., 1890.

[SEAL.]

E. R. SHIPWORTH, *Clerk.*

Endorsed: No. —. In the supreme court of the State of Oregon. —— term, 188—. Daniel W. Applegate, respondent, *vs.* B. F. Dowell, appellant. Filed Oct. 1st, 1888. W. H. Holmes, clerk.

Endorsed on cover: Case No. 14,196. Oregon supreme court. No. 209. B. F. Dowell, plaintiff in error, *vs.* Daniel W. Applegate. Filed October 1, 1890.

Office Supreme Court, U. S.
FILED
JAN 25 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.—TERM NO. 203.

B. F. DOWELL, Plaintiff in Error.

vs.

DANIEL W. APPLEGATE *et. al.*

Opinions of the Circuit Court of the United States for the District of Oregon.

In the case of

B. F. DOWELL *v.* J. APPLEGATE ET UX. AND C. AND J. C. DRAIN AND J. ELLENSBURG ET AL.

Circuit Court, District of Oregon.

(7 Sawyer, 282.)

JULY 8, 1881.

1. CONVEYANCE — INSUFFICIENTLY STAMPED — EFFECT OF.—Section 152 of the internal revenue act of June 30, 1864 (13 Stat., 292), as amended by act of July 13, 1866 (14 Stat., 141), while it avoids the record of a deed not duly stamped, or upon which the stamp is not cancelled, does not affect the validity of the original. Section 156 of said act (13 Stat., 293) imposes a penalty upon the vendor for not cancelling a stamp put upon his conveyance, but does not affect the validity of the conveyance itself. Section 158 of said act (13 Stat., 293), as amended by the act of July 13, 1866 (14 Stat., 142), imposes a penalty upon the maker for not duly stamping his conveyance, or omitting to cancel a stamp thereon, and declares the

same void if either omission was made "with intent" to defraud the Government: but whoever seeks to set aside or avoid a conveyance on that ground must allege and prove such fraudulent intent.

2. OMISSION TO STAMP CONVEYANCE.—An allegation that a conveyance was made and stamped for less than the actual consideration, with intent to aid or give color to a former fraudulent conveyance of the same premises to the grantor, or that such conveyance was made and stamped for an "inadequate" consideration, does not show that such conveyance was not duly stamped with intent to evade the stamp act.
3. CONVEYANCE TO DEFRAUD CREDITORS.—A purchaser from the grantee, in a conveyance to defraud creditors, without notice of the fraud, is, nevertheless, liable to any of such creditors for any portion of the purchase-money remaining unpaid after notice of the fraud, and a court of equity will give such creditor a lien upon the premises for the amount.
4. DEED, WHEN VOID UNDER THE INTERNAL REVENUE ACT.—A deed alleged to have been made with the intent to evade the internal revenue act or to defraud the United States, is not therefore invalid under section 158 (13 Stat., 294; 14 *Id.*, 152) thereof, and to make it so it must also appear that the deed was made without being duly stamped and with the intent thereby to evade the revenue act.
5. GRANTEE IN DEED.—Said section 158 only avoids a deed on account of the intent of the grantor therein, and it is immaterial with what intent the grantee receives it or to what use he puts it.
6. AMENDMENT OF BILL.—After a demurrer to a bill is allowed, the right to amend rests in the discretion of the court, and leave to amend will not be granted unless it is necessary to promote or attain the ends of justice in the case.
7. CASE IN JUDGMENT.—A demurrer to a bill being sustained, the plaintiff asked leave to amend to the effect that a deed to the demurrants was void under said section 158, for want of being duly stamped, which was denied—it also appearing that said parties were *bona fide* purchasers for an adequate consideration.

Before DEADY, District Judge.

THE plaintiff *in propria persona.*

W. Carey Johnson, for defendants.

DEADY, J. This case was commenced in the state circuit court for Douglas county, on October 11, 1879, and after sundry proceedings therein, was removed to this court by the plaintiff, on December 23, 1880, on the ground that its determination involved the construction of certain provisions of the internal revenue act of June 30, 1864 (13 Stat., 223), and the amendments thereto.

Here the plaintiff has restated his case, in the form of a bill in chancery, called "the amended bill," which was filed April 6, 1881.

The bill is entitled as one "in aid of execution," and the relief sought is, that certain conveyances made by the defendant, Jesse Applegate and Cynthia Ann his wife, to William H. H. Applegate and others, their children, of one thousand and eleven acres of land, in Douglas county, between the years 1867 and 1869, except one made for one hundred and sixty acres, in 1871, may be set aside as fraudulent and void, so that the same may be sold and the proceeds applied upon a debt of six thousand five hundred and eighty-four dollars and nine cents, due the plaintiff from the defendant, J. A., upon a judgment obtained by the former against the latter, in 1878, for his share of a judgment obtained by the state of Oregon against the plaintiff and said defendant, on August 4, 1874, as the sureties in the official bond of Samuel E. May, secretary of state, dated August 4, 1866, and subsequently satisfied by the plaintiff.

The bill alleges, that the conveyance to the defendant, William H. H. Applegate, was for two hundred and forty acres of said land for the "apparent consideration" of five hundred dollars; that said defendant, on June 24,

1871, "deeded" two hundred acres of the same to Charles Drain and John C., his son, for the nominal consideration of five hundred dollars, while the actual consideration was two thousand dollars in cash; that the consideration was expressed in the deed at the sum of five hundred dollars "to conceal the value of the land and to cheat and defraud the creditors" of said J. A., by making "the price correspond" with that of the deed to said defendant, William A.; and that the stamp thereon is only fifty cents, instead of two dollars, as required by the act of congress.

And further, that each and all of said conveyances, including those to said William A. and Charles and John C. Drain, "are illegal and a fraud under" the revenue act aforesaid; that an inadequate consideration was expressed in each of said deeds by the grantors and grantees, "with the intent of evading the provisions" of said act; that each of said deeds is stamped with a stamp of the value of fifty cents, and no more, although the grantors and grantees therein well knew that the land conveyed by each was, at the date thereof, worth more than one thousand dollars; that the record of said deeds was made in "violation of the spirit and meaning of sections 152, 156, and 158" of said revenue act; and that none of said stamps were "cancelled," as provided in said act, prior to the recording of said deeds.

The defendants, Charles and John C. Drain, demur to the bill. It is not alleged in the bill that they are not purchasers in good faith, and for a valuable consideration, and that they are such purchasers, was admitted on the argument, and therefore they are not affected by the alleged fraud in the conveyance to said William A.

The only question made upon the demurrer is, as to the validity of the deed to the Drains, under the stamp act of June 30, 1864, as amended by the act of July 13, 1866. The provisions of the act which are cited as bear-

ing upon the question, are found in sections 152, 156, and 158 (13 Stat., 292–294; 14th Stat., 141, 142).

Section 152, as amended, makes it unlawful to record any conveyance not duly stamped, or upon which the stamps are not cancelled as required by law, and declares the record of such conveyance "utterly void," and prohibits it from being used in evidence.

It is plain that this section in no wise affects the validity of the original conveyance, but is confined to excluding it from the privilege of record, unless it is duly stamped and the stamps cancelled.

Section 156, which is not amended by the act of July 13, 1866, *supra*, imposes a penalty upon any person "who shall fraudulently make use of an adhesive stamp to denote any duty imposed by this act," without cancelling the same.

This is a penalty without a prohibition, at least in terms. But it does not follow, if it were both, that a conveyance made contrary to it—one upon which the stamp is fraudulently uncancelled—is therefore void.

Generally, where a penalty is imposed for the commission or omission of an act relating to a contract, without a prohibition of such contract, the same is not thereby made void.

In re Pittock, 2 Saw., 423, the court, following what it understood to be the doctrine of *Harris* v. *Runnels*, 12 How., 83, laid down the rule as follows: "Where a statute contains both a prohibition and a penalty, a contract or transaction contrary thereto is absolutely illegal and void, unless it appears, upon a consideration of the whole act, that the legislature did not so intend."

And it is also admitted, that a contract made contrary to a penalty may be held void, if such appears to have been the intention of the legislature.

In such cases, much depends upon the nature and amount of the penalty prescribed, and whether it is aimed

at the contract itself, or only some form or incident of it—as, whether it was intended to prevent a contract or conveyance of the kind in question, or only as a security that it should be made on a certain kind of paper, or stamped with stamps of a certain value, which should be cancelled, so as to prevent their re-use.

In this case, the fact that the statute has, in section 158, in addition to the penalty imposed upon the maker for the omission to stamp a conveyance, provided specially that such conveyance shall be void in case such omission is the result of a fraudulent intent, tends strongly to show that it was not the intention of congress to make a conveyance void for want of cancelling a stamp thereon, in addition to the penalty imposed on that account.

Upon a careful review of the whole act, and the circumstances of the case, it is very clear and satisfactory, that such was not the intention of the legislature; and the fact that the stamps were not duly cancelled, as alleged in the bill, so far as section 156 is concerned, is therefore altogether immaterial in this controversy.

Section 158, as amended, provides, that a person who makes a conveyance without duly stamping the same and cancelling the stamps, as required by law, "with intent to evade the provisions of this act," shall be subject to a penalty, and "such" conveyance "not being stamped according to law," shall be deemed invalid and of no effect.

The provision concerning the cancellation of stamps, and the clause, "not being stamped according to law," were added to this section by the amendment of 1866.

A conveyance made contrary to this section is void; but the mere omission to stamp the conveyance, or cancel the stamps, does not constitute or establish a violation of the section. It must be alleged and proved by the plaintiff, not only that the conveyance to the Drains was in-

sufficiently stamped, or the stamps not cancelled, but that the omission in either case arose, not from accident or ignorance, but was the result of an "intent to evade the provisions" of the law; that is, with intent to defraud the government of the stamp duty. (*Campbell* v. *Wilcox*, 10 Wall., 422; *Green* v. *Holway*, 101 Mass., 243.) The act (schedule B) provides, that when the "consideration" of the conveyance does not exceed five hundred dollars, it shall be stamped with a stamp of the value of fifty cents, and an additional stamp of the same value for every additional five hundred dollars of consideration. The statement in the deed of the nature and amount of the consideration is at most only *prima facie* true, and may be contradicted. Therefore the stamps must be sufficient for the actual consideration, be that more or less.

It appears from the bill, that the conveyance in question is not sufficiently stamped, the true consideration being two thousand dollars, while that expressed in the deed, and for which it is stamped, is only five hundred dollars, and that the stamp actually used is not cancelled. But it does not appear that the omission to stamp the conveyance as for a consideration of two thousand dollars, rather than five hundred dollars, or the omission to cancel the one actually used, was the result of an intention to defraud the government; and this intent will not be presumed from the mere fact of the omission, which may have been caused by ignorance or accident. It must be alleged and proved, but the weight to be given to the fact of omission as an item of evidence, will depend upon the circumstances.

It is true, that every one is presumed to intend the ordinary consequences of his voluntary act (Or. Civ. Code, sec. 766, subd. 3), and it is equally true, that a necessary consequence of the omission to duly stamp this conveyance was a loss to the government. But it is still open to question, whether the omission was the voluntary

act—the very will and purpose of the maker of the conveyance; and even if it was, whether the motive of the act was to defraud the government, or not.

No reason is alleged for the neglect to cancel the stamp, but the bill ascribes two contradictory motives for the omission to duly stamp the conveyance made by said William A. to the Drains: 1. To make the consideration correspond with that in the conveyance from J. A. to himself, and thereby to promote the purpose for which it was made—to defraud the creditors of said J. A.; and, 2. That an "inadequate" consideration was "expressed" in such conveyance with intent to evade the revenue act.

The omission to stamp the deed, from the first motive, does not render it void. An act done with a purpose to defraud, or aid in defrauding, the creditors of J. A., is not an act done, so far as appears, with intent to defraud the government. Nor does it matter how "inadequate" the consideration for the conveyance is, so that the stamp used corresponds with it in amount. The statute does not require a person to dispose of his property for an "adequate" consideration, with a view of enhancing the revenue of the government from that source, but very properly leaves that to be cared for by the selfishness or the cupidity of the party interested. Neither is the allegation upon this point sufficient, although it suggests that the proper one was in the mind of the pleader. The consideration expressed must not only have been inadequate, but less than the amount actually paid. As section 158 of the stamp act, as amended by the act of March 3, 1865 (13 Stat., 481), provides that the title of a purchaser by deed duly stamped shall not be affected by the want of a stamp upon the deed of his grantor or predecessor in interest, the allegation in the bill, that the conveyance to said William A. was not duly stamped, is immaterial, so far as these defendants are concerned.

With this demurrer, there was also argued and submit-

ted the demurrer of the defendant, Jonas Ellensburg, to said bill.

The case made in the bill against him is this: The defendant, Charles Putnam, a grandson of the defendant J. A., and one of the persons to whom said J. A. conveyed a portion of his real property as aforesaid, on January 19, 1879, sold forty-two acres of the same to said Jonas for the sum of three hundred and twenty dollars, of which two hundred and twenty dollars, or two hundred and forty-five dollars, has been paid, and delivered him possession thereof, with a paper writing in the form of a deed, but without a seal, which has been illegally admitted to record; and the prayer of the bill is, that said writing be declared "inferior" to the lien of the plaintiff's judgment, or that said Jonas be required to account to him for the balance due on said purchase.

The bill does not allege that J. E. had any notice of the alleged fraudulent character of the conveyance to his grantor, and therefore his purchase in writing, even if it does not amount to a full and formal conveyance, is good against the plaintiff, except as to the unpaid purchase money. For this the plaintiff may, if he makes out his case against Putnam and J. A., have a decree that J. E. pay the unpaid purchase money to him, and that he have a lien upon the land to secure the same. (*Wood* v. *Mann*, 1 Sumn., 507; *Flagg* v. *Mann*, 2 *Id.*, 563; *McNeill* v. *Magee*, 1 Mason, 269; Story Eq. Jur., sec. 64, c; sec. 1503, a, b.)

The demurrer of Charles and John C. Drain is sustained, and the bill dismissed as to them; and that of Ellensburg is overruled.

SEPTEMBER 9, 1881.

(7 Sawyer, 239.)

Addison C. Gibbs and B. F. Dowell, for plaintiff.

W. Carey Johnson, for defendants.

DEADY, J. On July 8, 1881, a demurrer by the Drains to this bill was sustained, on the ground that it did not appear therefrom that the grantor had omitted to stamp the deed sufficiently with intent to defraud the revenue of the United States.

The plaintiff now moves for leave to amend his bill in this respect, and the defendants object, because the plaintiff, as to them, is seeking practically to enforce a forfeiture upon purely technical grounds against innocent purchasers, and therefore ought not to be favored by a court of equity; and because it does not appear but that the remaining property described in the bill as having been conveyed by J. A. to his children in fraud of his creditors, and still in their possession, is sufficient to satify the plaintiff's claim.

By the equity rule 35, the allowance of an amendment to a bill after a demurrer thereto has been sustained, is in the discretion of the court.

Stated briefly, the proposed amendment is to the effect: 1. That the deed in question was made and delivered with the intent to defraud the United States; 2. That it was made and delivered by the grantor, and accepted by the grantees, with intent to evade the provisions of the internal revenue acts; and, 3. That the Drains caused the said deed to be made and delivered, and used the same by having it recorded with intent to evade said acts, and with intent to defraud the United States out of a stamp duty of the value of one dollar and fifty cents.

The allegation that the deed was either made, delivered, accepted, or used with the intent to defraud the United States is false upon its face. The United States had no interest in this property, or claim upon the grantor, J. A. or W. H. H. A., that would render a conveyance of it to the Drains or any one else fraudulent as to it.

What the pleader probably had in his mind but failed to express or allege, is, that the deed was made, delivered, accepted, and used without being duly stamped, with intent to evade, defraud, etc.

To stamp or omit to stamp a deed is something apart from and in addition to the making, delivering, accepting, or using the same; and an allegation that either of these things was done with intent to defraud the United States or evade its revenue laws, is not an allegation that such deed was made, delivered, accepted, or used without being duly stamped, and is therefore immaterial in this suit.

It is also immaterial with what intention the Drains accepted this deed. Section 158 of the internal revenue act (13 Stat., 193; 14 *Id.*, 142) does not make any account of the intention with which a deed is "accepted" or received by the grantee. But in the case of a "bill of exchange, draft, order, or promissory note for the payment of money," it does provide that if such instrument is accepted, negotiated, or paid without being duly stamped, and with the intent to evade the provisions of the same act, it shall be invalid. The reason of this distinction is apparent. Whoever accepts a bill of exchange, thereby becomes an active party thereto. In effect and to that extent he makes or emits it—gives it a new life and circulation, and the intention with which he does so, so far as the stamp duty is concerned, is placed by the stamp act in the same category as that of the maker.

But in the case of any "instrument or document" other

than negotiable paper, the intention or purpose of the party to or for whom it is made or delivered, or the use he puts it to or makes of it, is simply immaterial.

Nor is it material in this suit whether the Drains caused this deed to be made, within the meaning of the statute or not, and could only become so in an action against them for the penalty imposed by the act. *If their grantor omitted to stamp it as required by law, with the intent to defraud the revenue, it is void, no matter who, or whether any one caused them to do so.* Nor does it appear that the Drains caused this deed to be made, otherwise than by becoming the actual purchasers of the property described therein; and that this did not bring them within the purview or penalty of the statute is too plain for argument.

The proposed amendment is immaterial, and that is a sufficient reason why the motion should be denied.

But I do not think this amendment ought to be allowed, even if it contained the allegation that the deed to the Drains is void because the grantor therein made and delivered the same to them without its being duly stamped, and with intent to defraud the United States.

Amendments to a bill after a demurrer thereto has been sustained, are not allowed as a matter of right, but rest in the discretion of the court; and are only allowed when they are necessary to promote or attain the ends of justice in the case. (*Hunt* v. *Rousmaniere*, 2 Mason, 365.)

The case sought to be made against these defendants by the amendment is this: J. A., being a co-surety with the plaintiff on an official bond, is alleged to have conveyed the premises to his son without or upon a grossly inadequate consideration, with intent to defraud the state and the plaintiff, who has since been compelled to pay the bond. But it is admitted that the Drains purchased from the son for a sufficient consideration and without *notice of such fraudulent intent, and are therefore not affected*

by it. Conceding this, however, it is claimed that the deed to the Drains is void because their grantor only put a stamp of the value of fifty cents on it when he should have put two dollars, with the intent to defraud the revenue of the difference, and therefore the property, for the purpose of this suit, must be considered as still held by the son under the fraudulent deed from J. A., and subject to be applied upon the latter's debt to the plaintiff.

But the plaintiff also imputes another, and, in my judgment, a more probable motive for the omission to stamp the deed sufficiently, and that is, that the consideration might correspond with that in the deed from J. A. to his son, and thereby give strength to the claim that the former was a *bona fide* transaction based upon an adequate consideration.

It is not at all probable, while the actual consideration of the deed in question was two thousand dollars, that it would be expressed in the deed at five hundred dollars, merely to save the expense of stamps to the value of one dollar and fifty cents, and at the same time incur thereby a penalty of many times that sum; while it is not improbable that it may for some reason have been so done with a view of preserving an apparent uniformity in the considerations of the two conveyances.

The two motives could hardly co-exist, and there is such a want of probability as to the former, that as between them, the latter must be accepted as the true one. But in any event, the Drains are innocent purchasers, and not parties to, or participants in, either the alleged fraud or fraudulent intention; and while they may be affected by the invalidity of the deed to them on account of their grantor's fraudulent omission to sufficiently stamp the same, I do not think that justice or equity requires the court to permit the plaintiff to amend his bill after a demurrer thereto has been allowed, so as to enable him to enforce a claim to the property founded upon

such invalidity—particularly as he had ample opportunity to bring the matter before the court by proper allegations in the amended bill to which the demurrer was taken.

Besides this, there is much force in the suggestion that the plaintiff ought not to be allowed to proceed against the property conveyed to the Drains, until it appears that the property of J. A., either in his own hands or that of his children, is not sufficient to satisfy his claim.

The motion to amend is denied, and the bill as to the defendants, Charles and John C. Drain, is dismissed with costs.

7 Sawyer, pp. 232–242.

B. F. Dowell v. Jesse Applegate.

Circuit Court, District of Oregon.

January 5, 1883.

1. Voluntary Conveyance to Children.—A. was a surety on the official bond of M., and being liable thereon for defalcations of his principal, but without knowledge of the same, conveyed property to his children in consideration of their having remained at home and worked for him on the farm during their nonage, and in pursuance of a promise made by him to that effect, which conveyance left him without sufficient property to meet his existing liabilities under said bond: *Held*, That the services given to the father by the children were not a valuable consideration for the promise or the conveyances as they only did what in law they were bound to do, and therefore the conveyances were voluntary—without a valuable consideration—and invalid as against the lien of a judgment subsequently obtained against A. on account of said defalcations, either by the obligee in the bond or a co-surety who had paid the full amount thereof.

2. IDEM—GRANDCHILD.—But a conveyance to a grandchild under like circumstances upon a promise to said child, and its father, to make the same, is not voluntary, but a conveyance for a valuable consideration, and therefore valid, as against such lien.
3. ESCHEAT FUND.—The secretary of state, as such, is not authorized under the laws of Oregon, c. 16, p. 582, to collect escheat funds from the treasury of state, and if he does so without authority from the party entitled thereto, or fails to account to him for the same, his sureties are not holden therefor.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

Addison C. Gibbs, and the plaintiff in person, for the plaintiff.

W. Carey Johnson, for the defendant.

SAWYER, Circuit Judge. After a careful consideration of the pleadings, evidence, and arguments of counsel in this case, I have reached the following conclusions, which I shall announce without any elaborate discussion of the evidence, or the points presented.

I am not satisfied that Jesse Applegate, or the other defendants, had any actual knowledge of any defalcations of May, prior to the appointment of the investigating committee of the legislature in 1870, or at the date of the execution of the several conveyances sought to be set aside. On the contrary, the evidence largely preponderates in favor of the opposite conclusion. I think those conveyances were made, and accepted, in good faith, and without any intent to defraud the state, or to evade the payment of any liabilities of Jesse Applegate on the official bond of May subsequently developed, and on which the judgment sought to be satisfied was afterwards recovered. There was then no actual fraud in making the conveyances, and they cannot be set aside on that ground.

The conveyances bearing date in April, 1867, I am satisfied were executed in that year. They bear date in April, 1867, and have certificates of acknowledgment appended thereto, which purport to have been made in May of that year, a few days after their dates; and all the direct testimony is, that they were fully executed and delivered, as early at least as the dates of acknowledgment; and that possession and control was taken in accordance with the conveyances. Conceding them to be voluntary conveyances from a father to his children for the purposes stated by them, they were made before any of the defalcations under the bond of 1866; and before any indebtedness accrued thereby to the state; and Jesse Applegate at the time owed no other debts than those arising upon the official bonds of May, 1862, and 1866, upon which judgments were subsequently recovered. The indebtedness on the bond of 1862 was comparatively small, being something over one thousand three hundred dollars. If the defalcations on this bond had already arisen, it was not known to the defendants, and there was ample property of Jesse Applegate left after these conveyances were made to satisfy this liability, as it was, in fact, afterwards satisfied out of other property of Jesse Applegate, without even resorting to any of the property subsequently conveyed to his other children by the remaining conveyances now in question.

That judgment having been fully satisfied, the liability upon which the recovery was had, arising out of defalcations under the bond of 1862, cannot affect the questions now involved, either as to the conveyances of 1867, or those subsequently made, conceding them to be voluntary.

At the dates of the several conveyances in 1869, and subsequently, I do not think Jesse Applegate had sufficient property left after making those conveyances, to reasonably satisfy the liabilities, at that time accrued and

existing on the bond of 1866, which have since passed into judgment against him, and complainant, Dowell, and been paid by Dowell. Those conveyances made by Jesse Applegate of his rights to his children, I am satisfied were voluntary conveyances. The only consideration was a promise of the father to his several children, that, if they would remain at home with him, and work on the farm till they should, respectively, become of age, or marry, he would do by them as he had done by the older brothers—convey to them a part of his lands, putting them all upon an equality, without agreeing to convey any specific tract.

This remaining with him was nothing more than they were bound to do under the law. They, therefore, neither gave, nor promised, any consideration. They remained, and the father simply fulfilled his promise, but the several conveyances can only be regarded in law, as having been made upon consideration of love and affection—a worthy, proper, and lawful thing to do, when the father is free from debt, and able to do it without injury to third parties.

But the law does not permit one to take that which really belongs, or ought to belong, to another, or is liable to satisfy another's demand, and give it to his children upon the consideration of love and affection. Some of these children, in fact, remained until after attaining their majority; but there is no independent, additional agreement shown by the evidence, by which they were bound to so remain.

There was no further contract for service, or further promise on account of their further services. I think, therefore, that these conveyances were taken subject to the rights of creditors existing at the time; and that the interest in the lands of Jesse Applegate attempted to be conveyed, is liable to be sold for the satisfaction of the judgment in favor of the state, which Dowell has paid;

and that Dowell is subrogated to the rights of the state as to one-half of the amount of the judgment paid by him.

The conveyance to Charles Putnam, the grandson of Jesse Applegate, stands upon a different footing. He was under no obligation to serve Jesse Applegate, but he did continue in his service from fourteen till over twenty-one years of age, on a promise made to him, and to his father, some years before the execution of the official bond of May, 1866, that Applegate would convey to him a portion of land, in all respects, as he had done, and agreed to do, to his other children.

This service formed a good and valuable pecuniary consideration, and the testimony shows that it was adequate to the value of the land. I think this conveyance valid, as against the judgment now sought to be enforced.

Jesse Applegate had only a life estate in the south half of the donation claim. The deed of Mrs. Applegate to her husband in the papers is not set up in the bill or pleadings; and is not relevant to any issue made. It cannot be known what defense might have been made to it, had it been alleged and relied on. It is not admissible and cannot be considered. Mrs. Applegate's conveyances to her children are, therefore, valid as to her interest; and those interests are not liable to be applied to the satisfaction of the judgment in question.

A question arises on the record as to when the indebtedness to the state attached as against Jesse Applegate and complainant Dowell in consequence of the defalcations of May.

Was it as to each embezzlement from the moment the funds were respectively appropriated, or from a demand on the part of the state and a failure to pay over the fund? Or at the close of the term when he failed to pay over on his retiring from office? Or when the amount was judicially ascertained by the judgment in the suit of the

state against May and his sureties? These questions, though important, have not been argued by counsel, and no authorities have been cited on the questions.

I do not see the bond in the record, but I suppose it contains the usual conditions in official bonds. If so, there must have been a breach at every time when May unlawfully appropriated the money of the state, as to the amount so appropriated, and I am disposed to think that this is the point of time as to each sum appropriated at which the liability or indebtedness of the sureties to the state attached.

Neither the state nor the complainant, Dowell, is entitled to any account of rents and profits of the lands from the dates of the several conveyances to the present time. Dowell has nothing in the land beyond a judgment lien, and this is neither a *jus ad rem*, nor a *jus in re*, but simply a right to have his judgment satisfied out of the land. There is no trust in his favor, actual or constructive. Had the property remained in Jesse Applegate, he would have been entitled to the use of it until actual sale, as in the case of other real property sold on execution. His grantees are in no worse condition.

The conveyances held valid, I do not think void under the evidence in the case, for want of stamps of greater value than the ones used. At all events, the complainant *does not present a case of such superior equities* as to entitle him to call upon a court of equity to grant him affirmative relief upon that ground.

A good deal has been said in the case about the money drawn out, ostensibly on behalf of an escheated estate, and used in the purchase of an organ for a church. That money seems to have been refunded by the church. I do not perceive that this matter in any way affects the case. I do not even see how the obtaining and use of this money by May, in the manner shown, could be an embezzlement of the funds of the estate for which his sure-

ties are liable. I cannot find by the statute that he was in any way interested with that fund. It was to go into the treasury, and there remain until drawn out by some one authorized to draw it. It was got out by May in some way illegally, in the assumed character of agent for the parties, legally entitled to receive the fund in a proper manner. May was not treasurer and the fund was never entrusted by the state to his keeping for any purpose. He had no duties in connection with it. If, in his assumed character of agent for the parties, he unlawfully got hold of the money, he was doubtless liable to them, and perhaps to the state; but it was not an official act for which his sureties were liable. But I do not understand that this forms any part of the judgment paid by Dowell, or that it can in any view affect the rights of the parties in this case.

Upon the views taken, there must be a decree for the complainant subjecting the life interest of Jesse Applegate in those portions of the south half of the donation claim, and the whole of the remainder of the lands described in the bill embraced in all the conveyances made in 1869, or so much thereof as may be necessary to satisfy the judgment for all moneys and interest thereon, arising from defalcations which had accrued at the date of the several conveyances respectively, and for costs.

DEADY, J. I concur in the conclusions reached by the circuit judge in the foregoing opinion and the reasons given therefor; and after hearing the counsel for the parties as directed by him, have settled the terms of the decree in the case.

Before stating them, it may be well to call attention to some of the leading facts in the case.

On September 6, 1862, Jessse Applegate and others became sureties on the official bond of Samuel E. May, secretary of state for the term of four years, and on

August 4, 1866, said Applegate and B. F. Dowell became such sureties on his second official bond for a like period thereafter.

At both these dates Jesse Applegate's property consisted substantially of certain lands, situate in Douglas county, including the donation claim, No. 38, in township 22 south, of range 5 west of the Wallamet meridian, which, with the exception of a tract of eight hundred and eighty acres on Mt. Yoncalla, he subsequently conveyed to his children and one grandchild in consideration of services performed by them on the farm during their nonage, and in pursuance of a promise by him to that effect, as follows: To William H. Applegate, one hundred and sixty acres of the north half of the donation claim by deed dated April 6, 1867, and eighty acres of the same by deed dated April 19, 1869; to Daniel W. Applegate, one hundred and forty-six acres in the south half of the donation claim in which he had a life estate for his own life by deed dated April 6, 1867, and eighty acres lying partly in the north and partly in the south half of the donation, but the larger part in the latter, by deed dated April 20, 1869; to Peter Applegate one hundred and seventy-five acres of the south half of said donation and forty-one and thirty-one hundredths acres in section 28 of the township aforesaid by deed of April 21, 1869; to Sallie Applegate, one hundred and sixty acres in section 23 of township 23 south of the range aforesaid, by deed of December 2, 1871, and to Charles Putnam, his grandson, two hundred and forty acres in township 22 south of the range aforesaid, by deed dated April 19, 1869.

At the date of the conveyances in 1867 May was a defaulter to the state under his first bond in the sum of one thousand three hundred and twenty-eight dollars and twenty-nine cents and under his second bond he became a defaulter in the sum of eight thousand five hundred and twenty-four dollars and twenty-five cents, of which

amount five thousand five hundred and forty-six dollars was incurred before January 1, 1869. In 1874 the state obtained judgments on those bonds for these defalcations amounting with costs and expenses to eleven thousand two hundred and fifty-eight dollars and fourteen cents.

On June 27, 1878, Dowell obtained a judgment against Jesse Applegate, in the circuit court for the county aforesaid, for the sum of four thousand eight hundred and eighty-two dollars and nineteen cents, the same being the one-half of the amount theretofore paid by him to the state on the judgment obtained by it against Dowell and Applegate on account of May's defalcations under the bond of 1866, together with one hundred and forty-six dollars and sixty-nine cents, costs and disbursements, making in all the sum of five thousand and twenty-eight dollars and eighty-eight cents; and on November 16, 1878, Dowell paid the state the remaining sum due on said judgment against himself and Applegate, to wit: one thousand three hundred and eighty-five dollars and sixty-four cents, and gave notice to the clerk of such payment and his intention to claim contribution therefor as provided in section 295 of the code of civil procedure; and, in pursuance of such notice and claim, caused an execution to issue upon said judgment against Applegate, upon which the Mt. Yoncalla tract of land was sold, and the proceeds, less the cost of sale, applied upon said claim for contribution, so that upon May 31, 1879, there was only two hundred and eighty-four dollars and sixty-one cents due him from Applegate on that account.

After making the conveyances of 1867, Jesse Applegate had still sufficient property to discharge his obligations to the state growing out of May's defalcations up to that time, but at the date of the subsequent deeds the case was otherwise. The conveyances of 1869 left him without sufficient means to pay the defalcations which had then occurred under the second bond.

The decree of the court will be, that the plaintiff has a lien upon the property of Jesse Applegate for the sum now due him on these judgments, to wit, seven thousand four hundred and eighty-eight dollars and forty-eight cents, and that the conveyances aforesaid, made since 1867, except the one to Charles Putnam, are, as against the lien of the plaintiff, invalid, and so far null and void; and that unless Jesse Applegate pay to the plaintiff the sum now due him, with his costs and expenses, within twenty days herefrom, the master of this court will proceed to sell, as upon an execution, all the interest of Jesse Applegate, on January 1, 1869, in the premises conveyed since 1867, except that portion conveyed to Charles Putnam, and after paying the expenses of the sale, to bring the remainder of the proceeds into court for distribution or application; and that the purchaser at such sale have, if necessary, due process from the court to put him in possession.

8 Sawyer, pp. 427–433.

[Filed December 19, 1887.]

D. W. APPLEGATE, *Appellant*, *v.* B. F. DOWELL, *Respondent.*

DECREE—OWNER OF LAND, WHEN NOT AFFECTED BY.—In a suit to quiet title, the plaintiff showed possession for the time limited by law for the commencement of actions to recover real estate, and also a regular deed thereto. *Held*, that a decree rendered against his grantor, subsequent to his purchase of the land, declaring the said grantor's deed fraudulent, where there was no issue upon the point in the suit in which the decree was rendered, did not estop the plaintiff from claiming title to the land.

UNITED STATES COURT—JURISDICTION OF.—United States courts in equity and common-law cases are courts of *limited* although *not inferior* jurisdiction, and some

especial grounds of jurisdiction must be shown to enable them to take cognizance of causes, and the facts set out as the ground of jurisdiction will be presumed to be the only source from which such jurisdiction is derived.

SAME.—Consent of parties does not invest the court with jurisdiction. The law must confer it, or it does not exist in the court.

SAME.—In a suit between citizens of the same State to set aside a deed as fraudulent, and subject land in the State to a judgment of the State courts, an allegation of fraud upon the revenue laws of the United States does not show a cause cognizable in the Federal courts under the laws of the United States.

DECREE OF COLLATERAL ATTACK UPON.—The courts of the United States being courts of superior jurisdiction, their decrees are not open to collateral attack, unless it is affirmatively shown by the record that they had no jurisdiction.

APPEAL from Douglas County. Reversed.

Williams & Williams, for Appellant.

J. F. Watson, for Respondent.

THAYER, J.—This appeal comes here from a decree of the Circuit Court for the county of Douglas. The appellant commenced a suit in that court to remove a cloud from his title to 40 acres of land, which he alleged in his complaint that he is the owner of in fee-simple, and in possession of. The land was a part of the donation land claim of Jesse Applegate in said county of Douglas. The respondent denied in the answer the appellant's ownership of the land, and claimed ownership thereof in himself, under a decree recovered by him against the said Jesse Applegate, the appellant, and others, on or about the fifth day of January, 1883, in a suit in the United States Circuit Court for the district of Oregon, and a deed executed to him in pursuance of such decree by

the master of chancery of said court, alleging that said land was included in a certain tract of land consisting of 121.55 acres, which was found in said suit by said United States Court to belong to the said Jesse Applegate, and subject to the payment of a certain judgment in favor of the respondent and against said Jesse Applegate. The appellant filed a reply to the respondent's answer, in which he denied that the title to said 40-acre tract, or any part of it, was in issue in the suit in said United States Court; denied that said last-mentioned court had any jurisdiction in said suit to render such decree, or that said master in chancery had any power to sell said land. Upon the hearing of the case in the court below the appellant, to maintain his cause, gave in evidence a deed to said 40-acre tract, executed to him by William H. H. Applegate and wife on the eighth day of October, 1874, which purported to convey to him said last-named tract. The deed was duly executed and acknowledged so as to entitle it to record, and was duly recorded in the office of the clerk of the county of Douglas, on the thirty-first day of October, 1874, in the record of deeds in said office. And it appears to have been conceded on the part of the respondent that at the time of its execution the said William H. H. Applegate held a deed from said Jesse Applegate to certain lands, which included said 40 acres, and that the same was a part of said Jesse Applegate's donation claim before referred to.

The respondent, to sustain the issues on his part, gave in evidence a duly certified copy of an amended and supplemental bill, filed in said United States Court in said suit on the twelfth day of September, 1881, in which the respondent was complainant, and the said Jesse Applegate, William H. H. Applegate, the appellant, and others were defendants; also of an answer to said bill filed in said suit by the appellant; and also of the decree of the court therein, and of the deed executed to him by

said master in chancery. Said deed bears date of December 6, 1883. The appellant's counsel objected to the admission of said evidence upon the grounds of irrelevancy and immateriality, which objection the court overruled, and the appellant's counsel excepted to the ruling.

The main issue between the parties is the ownership of the 40 acres of land in suit. The appellant, I would infer, was in possession of the land at the time the suit was commenced, as his allegation of possession is not denied in the respondent's answer; and it was admitted at the hearing that he paid full value for it upon the purchase thereof referred to. The Circuit Court failed to make any findings of facts and law as required by section 393 of the Civil Code, as amended in 1885, and the counsel on either side have presented only a cursory view of the matter, and the briefs they have submitted contain but a meager statement of it. The court is left, therefore, to search through the various documents referred to in order to find out what is in the case.

The bill filed in the suit in the United States Court states substantially that the respondent and the said Jesse Applegate became co-sureties to the State of Oregon in 1862, and also in 1866, upon the official bond of Samuel E. May as Secretary of State, who was elected to said office for two successive terms in said years; that May became a defaulter upon the bonds, and judgments were recovered in favor of the State and against the sureties upon each of them some time in 1874; that one of said judgments was for $8,929.85, besides costs and disbursements, and a transcript thereof was filed and the judgment was docketed in the office of the clerk of the county of Douglas on the eleventh day of August, 1874; that prior to the twenty-seventh day of June, 1878, the respondent paid on said last-mentioned judgment $10,837.75, and on said day recovered a judgment against said Jesse Applegate as his co-surety on said payments for the sum

of $4,882.19, which was on the same day entered on the judgment-lien docket of said county of Douglas; that respondent, on the sixteenth day of November, 1878, paid on the said judgment $1,385.61, the balance due thereon, and gave due notice that he claimed the benefit of it against said Applegate, and became subrogated to the rights of the State in reference thereto, upon which he caused an execution to be issued, and collected the larger part thereof; that the amount of his claim against said Applegate, arising out of said affairs, was, on the first day of January, 1881, $3,584.09; that said Jesse Applegate, in 1849, took the said donation land claim under the Donation Act of September 27, 1850, which is claim No. 38, notification No. 54, certificate No. 103, T. 22 S., R. 5 W., W. M., and contains 642 acres; that he perfected title thereto, the north half to himself, and the south half to his wife, Cynthia Ann Applegate. He also acquired other lands situated in said county of Douglas, and which are described in the said bill. That said Applegate and wife, with intent to delay, cheat, and defraud the State of Oregon and the respondent out of said debts, deeded all of said lands to their children as follows: To said William H. H. Applegate, their son, 160 acres of the north half of said donation land claim, by deed dated the sixth day of April, 1867, for the apparent consideration of $500; also 80 acres of said donation land claim, by deed dated the nineteenth day of April, 1869, for the apparent consideration of one dollar, which deeds were recorded in the office of the clerk of said county, the first one, the sixth day of February, 1869, and the second one, the fourth day of May, 1869. To the appellant, their son, 160 acres of the Jesse Applegate part of said donation land claim, by deed dated April 6, 1867, for the apparent consideration of $500, which deed was recorded in said last-mentioned office the sixth day of February, 1869; also 80 acres of said donation

land claim, for the apparent consideration of one dollar, which was recorded in said office May 5, 1869. To Charles Putman, a grandson of Jesse Applegate and wife, a tract of land outside of the donation claim. To Peter Applegate, their son, 211.31 acres of land, 170 acres of which was a part of the said donation land claim; also to Sallie Applegate another tract of land outside of the donation land claim.

The bill charges that said deeds were illegally recorded; that each and all of the grantees received them with the intent before mentioned; that each and all of them had notice that said Jesse Applegate was largely indebted to the State of Oregon as the security of May on said bond at the time each deed was made and delivered, and that they well knew that the deeds would make the grantor, Jesse Applegate, insolvent; that the deeds to William H. H. Applegate and to appellant, dated 1867, were antedated, for the purpose to deceive, cheat, etc.; that the pretended money consideration in each was inadequate, and that neither of the grantees paid any money for the land described in said deeds. It is also alleged in said bill that on the seventeenth day of September, 1879, an execution was issued on respondent's judgment against Jesse Applegate to the sheriff of Jackson County, and that it was since returned unsatisfied; and that on the seventh day of October, 1879, an execution thereon was duly issued to the sheriff of Douglas County, and had been since returned unsatisfied; also that on the twenty-fourth day of June, 1871, the said William H. H. Applegate deeded 200 acres of the north half of said donation land claim to Charles and John C. Drain, for the sum of $2,000, cash, and that this deed was also illegal, fraudulent, and void; that the actual price paid was $2,000, yet the deed, to conceal the value of the land and to cheat and defraud the creditors, etc., expressed on its face the consideration of $500 only, and in place of having a

revenue stamp of two dollars, as was required by the act of Congress at the date of said deed, only had a revenue stamp of fifty cents; "that each and all of said deeds to William H. H. Applegate, to the appellant, and to the other grantees before mentioned, were illegal, and a fraud under the statutes of the United States, entitled 'An act to provide internal revenue to support the government, and to pay interest on the public debt,' approved thirtieth day of June, 1864, and the amendments thereto; that an inadequate consideration was expressed in each of said deeds by the grantors and grantees, with the intent of evading the provisions of said statute; that the grantors and grantees well knew that the land conveyed by each deed was at the date thereof worth in cash more than $10,000, and each of them have a revenue stamp on them of fifty cents and no more, not one half the amount required by said act of Congress; and the recording of each of them was in violation of the spirit meaning of sections 152, 156, and 158 of said statute; that none of said stamps have been canceled by writing the date when the deed was so used or stamps affixed on the same, and that none of them have the initials of the person using them or affixing the same prior to the placing said deeds on the records of Douglas County, in the State of Oregon."

The allegation in reference to affixing the revenue stamps upon the deeds, their inadequacy, and the neglect to cancel them before the recording of the deeds, were evidently made in order to give the United States Court jurisdiction of the suit. The bill in fact shows upon its face that said court would have had no jurisdiction of it in the absence of such allegations, as it contains in the outset an express statement that all the parties to the suit were citizens of the State of Oregon. Whether such allegations made such a case as would entitle the United States court to assume jurisdiction of the subject-matter involved in said suit will be referred to hereafter. The

foregoing facts are the main features of the amended bill. The supplemental bill merely sets forth some changes that occurred in regard to the affairs of the parties after the filing of the amended bill, which need not be considered.

I find nothing material to this case in the appellant's answer to said bill; it purports to be his separate answer thereto, and the statement to that effect is in the usual form laid down in equity precedents. Many of the matters stated in the bill are admitted in the answer. The appellant denied the fraudulent intent charged in the bill against Jesse Applegate and wife in making the deeds referred to therein, or in deeding to appellant the 160 acres of land by the deed of the 6th of April, 1867; denied that said deed conveyed, or purported to convey, any part of Jesse Applegate's half of said donation land claim, or that the consideration therein named was an apparent consideration; but alleged that the whole of said land conveyed by both of the deeds from Jesse Applegate and wife to him was in the southeast part of the wife's half, except a small piece which lay south of said claim, and that said deeds were made and delivered to him for a good, valuable, and sufficient consideration, which is specified in the answer. And the appellant denied all the fraud charged against him in the said bill, or relating to his receiving and recording the deeds executed to him, or their effect upon the solvency of said Jesse Applegate, or that he was insolvent in consequence of the making and delivery of said deeds, or that the deeds were illegal or fraudulent, or a fraud under the statutes of the United States, or any statute relating to the internal revenue, and all the matters connected therewith charged in the bill; and averred that the deeds were executed to him, and that he received them in good faith. It will be seen from an inspection of the said decree that the said United States court adjudged that

Jesse Applegate became indebted to the respondent in the manner and to the extent substantially as alleged in the bill; that the latter thereby acquired a lien to the amount of such indebtedness upon all the real property of said Jesse Applegate situate in said county of Douglas, from and since the entry and docketing of the judgments mentioned and set forth in said bill; also that on and prior to April 19th, 1869, said Jesse Appelgate was the owner in fee-simple of 121.55 acres of the north one half of said donation land claim, the said 121.55 acres being, as stated in said decree, the whole of said north half of said claim, except the portion, 200 acres, more or less, conveyed by William H. H. Applegate on June 24th, 1871, to Charles and John C. Drain. That it was adjudged therein that the conveyance of said 121.55 acres by Jesse Applegate to his sons, William H. H. Applegate and Daniel W. Applegate, by deeds dated April 19 and 20, 1869, respectively, was voluntary and without a valuable consideration, and in fraud of the rights of the respondent, and was, therefore, as against him and his assigns, declared to be null and void; that it was also adjudged in said decree, that the several conveyances to Peter Applegate, and to the daughter, Sallie Applegate, stood in the same condition, and were also held to be null and void to the same extent; and that it was decreed therein that unless said Jesse Applegate, Daniel W., William H. H., Peter, and Sallie Applegate pay the amount of the indebtedness to the respondent, with costs, etc., within twenty days from the entry of the decree, that the master of the court was authorized and required to sell as upon execution all the interest of said Jesse Applegate on January 1, 1869, in certain pieces of land, viz., the 121.55 acres of the north half of said donation land claim, and all the south half of said claim except the 140 acres, more or less, conveyed, the decree states, by Jesse Applegate to said Daniel W. Applegate, and the portions deeded

to said Peter and Sallie Applegate. And that it was further adjudged and decreed therein and thereby, that the conveyance by Jesse Applegate to William H. H. Applegate, on April 6, 1867, of 160 acres, more or less, in the north half of said donation claim, and the conveyance by him to his son, Daniel W. Applegate, appellant herein, of the same date, of 146 acres, more or less, in the south half of said claim, were made in good faith, etc. It will also be observed by an inspection of the said deed from the master to the respondent that the provision of the decree, authorizing and directing him to make the sale of the said interest of Jesse Applegate, was executed.

From these various facts we have to determine the status of the title to the 40 acres of land in dispute. The suit herein was commenced on the seventeenth day of August, 1886, and when the appellant introduced his deed from said William H. H. Applegate in evidence at the hearing, he made out under the issues in the suit a *prima facie* case. At that stage of the proceeding he was presumably entitled to the relief claimed. He was in possession of the land under an absolute deed of title, which had been executed to him and recorded in the office of the clerk of the county in which the land is situated more than eleven years; and the respondent was claiming it adversely to him. In order to defeat such recovery, it devolved upon the respondent to prove that appellant had acquired no title to the land, or that he had aliened it, or, in some legal manner, had been divested of it. And for that purpose the respondent introduced in evidence the said decree of said United States court, and other proceedings connected therewith. Whether that evidence was effectual for the purpose depends upon the two questions already alluded to, viz.: *First*, whether the said decree operated upon or affected the appellant's title derived under the deed from William H. H. Applegate of October 8, 1874; and *second*, whether

the said United States court had jurisdiction of the suit in which the said decree was rendered.

It is very difficult to determine from the *data* before us when or how Jesse Applegate disposed of, or attempted to dispose of, the 40 acres of land in question. It is alleged in said bill that he and his wife deeded to said William H. H. Applegate 160 acres of the north half of the said donation claim, by deed dated April 6, 1867; also 80 acres of said donation claim, by deed dated April 19, 1869. These two parcels constitute all the land shown by the said bill to have been conveyed to said William H. H. Applegate. It is not stated in the bill in which half of the claim the said 80 acres are situated, but as said William H. H. Applegate deeded 200 acres in the north half of the said claim to the Drains, and the 40 acres, also in said half of the claim, to the appellant, which correspond in acreage to the 160-acre parcel and the 80-acre parcel, it is evident that the latter parcel is situated in said north half also, and that the said 40 acres must have been deeded by Jesse Applegate and wife to William H. H. Applegate by one of the said deeds referred to. Nor is this view inconsistent with the inferential statement in the decree, that Jesse Applegate conveyed said 121.55 acres to his sons, William H. H. Applegate and Daniel W. Applegate, by deed dated April 19 and 20, 1869. It will not be presumed that Daniel W. Applegate purchased of William H. H. Applegate, land, and paid him the full value therefor, which he already had a deed to from the latter's grantor. The decree, then, only operated upon the conveyance from Jesse Applegate to William H. H. Applegate long after the latter had conveyed the land to the appellant, and whether that affected the title in the appellant's hands is the question for determination. The deed to William H. H. Applegate was not void, conceding it to have been a conveyance made with intent to hinder, delay, or defraud creditors, although the statute declares

that such conveyances shall be void. It was good as between the parties, and as to every one except creditors, and they can only treat it as void in a proceeding to collect their debts. A sale of the property to a *bona fide* purchaser for value will cut off their claim and pass a good title. (Wait on Fraudulent Conveyances and Creditors' Bills, §§ 409, n. 1, 445.)

It was claimed on the argument by the respondent's counsel that it was the duty of the appellant to have interposed a plea in the suit in the United States court that he was such a purchaser, if he claims to have been such, and that his failure to do so estops him from setting up any claim of title to the land. The suit in the United States court was in the nature of a creditor's bill. Its object was to subject certain property Jesse Applegate had conveyed to his children to the payment of a debt he was owing to the respondent. It was to ascertain the intent of said Applegate in making the conveyances, and if found to be fraudulent, to direct a sale of the property and application of the proceeds to the payment of the debt. The conveyances were to the several parties, and were separate transactions in the main, though probably not to such an extent as to require separate suits to be brought against each. The bill under the rule laid down in *Fellows* v. *Fellows*, 4 Cowen, 682, may not have been objectionable upon the ground of multifariousness, and yet the appellant was not required to answer any matter charged against any of the other defendants in the suit, and there was no charge against him regarding the purchase of the said 40 acres of land. The said Jesse Applegate was charged in the bill with having conveyed it, with other lands, to said William H. H. Applegate, with intent to delay, etc., his creditors, and the latter was charged with having accepted the conveyance under circumstances that might cast suspicion upon his good faith in the affair.

The difficulty in the case arises from the fact that the complainant in the bill treated the land as being held by said William H. H. Applegate, under a deed from said Jesse Applegate, and only sought to have that deed annulled; when in fact the former had long prior thereto conveyed the land for an adequate consideration to appellant, by a deed that at the time of the filing of the bill had been standing upon the records of Douglas County for nearly seven years; and the appellant was probably in possession of the land at that time. Was the latter, then, bound by the decree? He might have been, possibly, if the conveyance to him had been a secret one, and he would not, unquestionably, if he had not been made a party to the suit. But was he a party to the suit for the purpose of affecting the transaction of his purchasing the land from his brother in 1874? All the defendants in the bill were made parties in order to prevent a multiplicity of suits. As between them, respectively, and the complainant, except as to some common matter, if there were any such, the suit might be regarded it seems to me, the same as though it had been brought against them separately. The complainant could have had the sale from William H. H. Applegate to the appellant inquired into, the same as he did the sale from the former to the Drains. He could have charged the parties with bad faith in the affair, and if it had been sustained, have been relieved from its effect; but he did not seek to do that. He contented himself with impeaching the deed from Jesse Applegate to William H. H. Applegate, and left the other in *statu quo*. It was his duty to ascertain whether or not William H. H. Applegate had conveyed away the land, and if so, have had the transaction inquired into, if he desired to question it; as the appellant's counsel very pithily expresses it in his brief, "it was Dowell's business to see that the holder of the legal title was sued, and not the business of the holder of the legal title to see that Dowell sued the proper person."

The decree itself only binds the parties to the suit, and concludes them no further than the issue determined therein. It does not bind them as to matters which were not in issue in the case. If the validity of the said deed from William H. H. Applegate to appellant had been made an issue in the suit, the decree would have been conclusive upon the question; but it would had to have been directly in issue, and not merely collaterally litigated. "It must be a fact immediately found according to the pleadings, not that on which the verdict was merely based, *a fact in issue as distinct from a fact in controversy.*" (*Glenn* v. *Savage*, 14 Or., 573.)

The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties, upon a different claim or cause of action, is often overlooked. And it is from that circumstance that attorneys and courts have frequently been misled by the rule laid down in *Le Guen* v. *Gouverneur*, 1 Johns. Cas., 436, to the effect that the judgment of a court of competent jurisdiction is not only conclusive as to all questions actually decided, but as to all which the parties might have litigated and had decided therein. Judge Field in *Cromwell* v. *County of Sacramento*, 94 U. S., 351, has pointed out the distinctions referred to, with his accustomed clearness and accuracy. It amounts simply to this, that if the second action is upon the same claim, the former judgment, if upon the merits, will constitute a complete bar, not only as to every matter that was brought in to defeat the claim in the former action, but as to every other matter that would have been admissible for that purpose. If, however, the second action is upon a different claim, the former judgment will only operate as an estoppel against the matters actually litigated therein. In that case it concludes only those facts that were directly in issue in

that action. The inquiry in the latter case, Judge Fields says, "must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined; only upon such matters is the judgment conclusive in another action." The case here clearly belongs to the latter class, and the decree in the United States court, conceding its validity, does not conclude the appellant from asserting title to the 40 acres of land in controversy.

The view we have taken of the first one of the questions before mentioned renders it unnecessary to consider the second. But the matter is of too much public interest, I think, to be passed over without observation. Parties to a litigation in this State have often been desirous of having it adjudicated upon in the federal courts. A preference in favor of those tribunals on account of the learning and ability of the judges who preside over them is very proper. It must, however, be borne in mind that the jurisdiction of the United States courts in equity and common-law cases is limited, although they are not inferior courts. That it is necessary to show in the outset, when a case of that character is sought to be commenced therein, some especial grounds of jurisdiction over it before they are authorized to assume the right to decide the matter submitted, and that the facts set out as the ground of jurisdiction will be presumed to be the only source from which it is derived. When, therefore, the facts upon which it is claimed are not sufficient to confer jurisdiction, it cannot attach; nor will it matter if the parties, as they often do, consent to the courts exercising it under such circumstances. Consent will not confer jurisdiction over the subject-matter in any case. The law must give it, otherwise it cannot be acquired. Nor will the decision of the court that it has jurisdiction avail where facts are required to be shown as a condition of its exercise, unless they legally tend to establish a case

conferring it. No court can obtain jurisdiction by arbitrarily deciding that it has it. I am induced to make these suggestions, for the reason that it is a very unpleasant and extremely delicate duty to be required to pass upon the authority of another court to adjudicate an important matter. And there should never be occasion for it where it can possibly be avoided.

The only grounds, as before observed, upon which it can be claimed that the Circuit Court of the United States for the district of Oregon had jurisdiction of the suit of *Dowell* v. *Applegate,* in which the said decree was given, were the allegations in reference to the insufficiency of the revenue stamps upon the deeds, executed by Jesse Applegate and wife to their children, and by William H. H. Applegate to Charles and John C. Drain. The bill filed therein stated expressly that all the parties were citizens of the State of Oregon. The proceeding was to enforce the payment of the judgments recovered in the State courts of the State of Oregon, growing out of a defalcation of one of its State officers. It was a suit to reach property that the plaintiff, in one of the judgments, and who had been subrogated to the rights of the plaintiff in the other, had been unable to reach by the ordinary process of execution issued out of the State court. The jurisdiction of the said United States court was invoked as auxiliary to the process of the State courts, and the federal question involved in the case, if it deserves to be considered as such, was not regarded of sufficient importance to receive from the court in the opinions *delivered more than a passing remark, and was evidently thrown into it as a mere subterfuge upon which to claim the benefit of federal jurisdiction.*

It is to be seriously regretted that the decree of a court of so high a standing, in a suit of such magnitude and importance, that was tried with ability, and decided with great care and painstaking, should hang upon so

slender a thread for its authority. The complainant in the suit was anxious no doubt to have it tried in the federal court, and it is more than probable that the defendants therein willingly consented to it. Parties may agree to an arbitration of their differences, but they cannot clothe a court with power to hear and determine a case. The law must invest that authority. The Constitution of the United States delegates to it certain judicial power. It extends to all cases, in law and in equity, arising under the Constitution, the laws of the United States, and treaties made under their authority, to controversies between citizens of different States, and to a few other cases, which need not be mentioned. The United States court must have acquired jurisdiction over the suit referred to, under an act of Congress adopted to carry out the two provisions of the Constitution above set out; and the extent of authority of such act must be measured by the power delegated by the said provisions. The former may be co-extensive with the latter, but can not exceed it. Of course it will not be claimed that the controversy was between citizens of different States, in view of the statement referred to in the bill. It must have been a case "arising under the laws of the United States." And how could it be regarded as such a case when the right of Dowell to a recovery in the suit did not depend upon any such law. Judge Deady, in *Dowell* v. *Griswold*, 5 Sawy., 43, very properly observes, that "a case does not arise under such a law within the scope of that jurisdiction, unless the very right of the party springs out of, or has its origin in such law." And this is but a reiteration in effect of the language of that profound jurist, Chief Justice Marshall, whose decisions long ago established the land-marks in the law of construction of the jurisdiction of the federal courts, under the Constitution of the United States. In *Cohens* v. *Virginia*, 6 Wheat., 379, he said that a case "may truly be said to

arise under the Constitution, or a law of the United States, whenever its correct decision depends upon the construction of either." And in *Osborne* v. *Bank of the United States*, 9 Wheat., 882, said inferentially, that it would be a sufficient foundation for jurisdiction, "that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."

How Dowell's right to have the deeds referred to set aside, and the land conveyed thereby sold, and the proceeds applied in payment of the two judgments, was affected by any construction of any act of Congress, might be explained by metaphysical subtleties, but no ordinary logic can demonstrate it. What difference could it have made to him whether the revenue stamps upon the deeds were sufficient or not, or any revenue stamps were on them at all. *It did not enlarge his rights by not being there, or lessen them by being there, nor vice versa.* If their not being on would have rendered the deeds void, that would not have authorized Dowell to sequester the lands, nor their being on, and canceled with due formality, have prevented him from obtaining the relief sought. No deformity of the deeds could affect the merits of the controversy between Dowell and the Applegates. The gravamen of the suit was the alleged fraudulent transfer of the lands, and consequent effect upon Dowell's rights; and the allegation of fraud upon the revenue laws of the United States, by not affixing sufficient stamps upon the deeds, was a flimsy pretext for bringing the suit in the United States court, or for transferring it to that court from the State court. It would have been more honest to have brought it there, or have transferred it there as a matter of course, and just as legitimate. It was a fraud upon a law adopted as a part of the system of our government, and such practices should be discountenanced.

As I view the matter personally, the said decree of the United States court has not a prop of inherent support upon which to stand; that, in fact, it was *coram non judice*. Such decrees, however, possess an immunity from collateral attack, which public policy requires to be maintained. The court that rendered it, although a creature of statute, having only defined powers, stands upon the footing of a court of superior jurisdiction; and if the record were silent as to its having acquired jurisdiction in the case, it would readily be presumed that it had jurisdiction. When jurisdiction is assumed by a court of superior jurisdiction, it will be presumed, in a collateral proceeding, that it exercised it rightfully. Nor can such presumption be overcome by proof *de hors* the record. The only mode in which its jurisdiction can be questioned in such a case is by appeal or writ of error. But the difficulty here is that the record is not silent as to the existence of the conditions necessary to confer jurisdiction upon the court; it speaks; says the parties were all citizens of the State of Oregon, and that the subject-matter of the suit was an affair purely of local concern. It shows some facts, it is true, from which it might be inferred that the United States was defrauded of revenue, and which are connected with the transactions complained of, but they evidently had no bearing in the case—could not possibly affect the merits of it. I feel that the decree ought to be sustained if it can be consistently with the principles of law, but it certainly has a shaky foundation upon which to stand. It is an unfortunate circumstance, as I regard it, that the United States court attempted to take jurisdiction of the case. It is highly important that the line of demarkation between State and federal jurisdiction be strictly observed. A stride across the boundary, from either side, necessarily must result perniciously, and prudence dictates that it is far better to yield disputed ground, than occasion a collision.

Whether the said decree is vulnerable to collateral attack or not, we do not, for the reasons before suggested, undertake to decide, but under the view taken of the first of the two questions before mentioned, the decree appealed from herein must be reversed, and I suppose under said act of 1885 the case will have to be remanded for a new trial. The act will bear that construction, and was evidently intended to place suits in equity when tried by the court upon the same footing of actions at law, and subject them to the same rules of practice.

15 Oregon, pp. 513–529.

[Filed January 16, 1889.]

D. W. APPLEGATE, Respondent, *v.* B. F. DOWELL, Appellant.

LAW OF THE CASE—SECOND APPEAL.—The decision of this court becomes the law of the case, and upon a second appeal, is binding upon the court and the parties, and from which the court is not at liberty to depart.

APPEAL from Douglas County.

R. and E. B. Williams and *J. W. Hamilton*, for respondent.

James F. Watson and *B. F. Dowell*, for appellant.

STRAHAN, J.—When this cause was before this court on the former appeal (*Applegate* v. *Dowell*, 15 Or., 513), the law applicable to the facts then presented was fully stated and discussed. The cause was tried as an action at law under the act of 1885, and finding error, this court remanded the case for a new trial.

Upon the second trial no new facts that were material were developed, and the court below simply applied the principles of law announced by this court to the facts as they appeared, which resulted in a decree for the plaintiff, from which the defendant has appealed.

Upon this appeal we are not at liberty to depart from the law announced in the case on the previous appeal.

The decision then made became the law of the case, binding alike upon the court and the parties on any subsequent appeal. (*Powell* v. *D. S. & G. R. R. Co.*, 14 Or., 22; 2 Herman on Estoppel, p. 118, note 1.)

17 Oregon Reports, p. 299.

SUPREME COURT OF OREGON.

B. F. DOWELL *et al.*

vs.

DANIEL W. APPLEGATE, SALLIE APPLEGATE LONG, *et al.*

DECIDED JULY 31, 1893.

Appeal from Douglas County.

Pipes, Judge, 33 Pacific Reporter, 937:

"*Per Curiam.*—This is a suit to quiet title to certain real estate in Douglas County, formerly belonging to Jesse Applegate. Passing without notice all preliminary and incidental questions and coming directly to the merits, it appears—

"1. That the title to the 40-acre tract of land under which plaintiffs now claim was in controversy between the same parties in the case of Applegate *v.* Dowell, reported in 15 Or., 513, 16 Pac. Rep., 651, and 17 Or., 299, 20 Pac. Rep., 429, and was there adjudged to belong to the defendants, and the question is therefore *res adjudicata* in this case.

"2. Plaintiffs' title to the remainder of the land depends upon a validity of a decree of the United States Circuit Court for the District of Oregon, rendered in a suit of B. F. Dowell *v.* Jesse Applegate *et al.*, brought to set aside certain conveyances for fraud. From the Record of that case in evidence it affirmatively appears to have been a controversy wholly between citizens of this State, and involving no question arising under the laws of the United States, and therefore, in our opinion, the court was without jurisdiction, and the decree is void. It follows that the decree of the court below must be affirmed."

ERRATA.

With the permission of the court, attention is attracted to what are clearly clerical or typographical errors in the Record of case, Dowell, plaintiff in error, *vs.* Daniel W. Applegate, October term, 1893, No. 209.

1st. In line 6, page 7, printed Record, the figures "1879" should be "1869."

2d. In line 3, page 33, printed Record, the word "held" should be "filed."

3d. In the 7th line from the bottom of page 39, printed Record, the words "Daniel W. Applegate" should be "Wm. H. H. Applegate."

4th. In the 13th line from the bottom of page 39, the word "thousand" should be "hundred."

The above are no doubt errors, and do not affect the case.

Whether they occurred in the original papers, in copies made for evidence, or in making transcripts for appeal to the State Supreme Court or to this court, I have no means of knowing.

J. N. DOLPH.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

October Term, 1893.—No. 209.

B. F. DOWELL, Plaintiff in Error,

vs.

DANIEL W. APPELGATE.

In Error to the Supreme Court of the State of Oregon.

BRIEF ON PART OF PLAINTIFF IN ERROR.

B. F. DOWELL and
JOHN H. MITCHELL,
Attorneys for Plaintiff in Error.

Press of McGILL & WALLACE Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1893.

B. F. DOWELL, Plaintiff in Error,
vs.
DANIEL W. APPELGATE.
} Term No. 209.

In Error to the Supreme Court of the State of Oregon.

BRIEF ON PART OF PLAINTIFF IN ERROR.

This case is here in error to the Supreme Court of the State of Oregon.

I.—Statement of Case.

This is a suit in equity, brought originally by Appelgate, the defendant in error, against Dowell, the plaintiff in error, in the State Circuit Court of the State of Oregon for the county of Douglas, for the purpose of removing an alleged cloud on the plaintiff's alleged title to a tract of forty acres of land lying in Douglas County, State of Oregon.

The suit was brought in pursuance of the provisions of a statute of the State of Oregon, entitled "An act au-

thorizing suits in equity to acquire title to real estate," approved October 11, 1862. (Hill's Code, p. 455, secs. 504, 505.)

The act is brief, and reads as follows:

"Any person in possession, by himself or his tenant, of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest."

Act Oct. 11, 1862, sec. 504, p. 458, vol. 1, Hill's Annotated Laws of Oregon.

II.—Complaint.

The complaint is brief (Record, 1–2), and states in substance that the plaintiff, Daniel W. Appelgate, was, at the commencement of the suit, and for a long time prior thereto, the owner in fee simple of forty acres of land lying in Douglas County, State of Oregon; that the same is a part of the donation land claim of Jesse Appelgate; that plaintiff derived his title thereto by a deed of conveyance to him from William Henry H. Appelgate and Mary Elizabeth Appelgate, his wife, executed October 8, A. D. 1874, which it was alleged was duly recorded in the record of deeds in Douglas County, State of Oregon, on the 31st day of October, 1874.

The complaint further avers that the defendant, Dowell, claimed to own an estate or interest in said lands adverse to the title of plaintiff; that Dowell's claim is under and by virtue of a deed of conveyance to him from William B. Gilbert, master in chancery of the Circuit Court of the United States for the District of Oregon, executed on the 6th day of December, 1883, and acknowledged on the 28th day of March, 1884, and recorded on the 19th day of August, 1884, in volume number 15, at pages 482–488 of said Record, by virtue of a sale made in

pursuance of a decree of said Circuit Court, made and entered therein on the 5th day of January, 1883, in a case wherein B. F. Dowell, plaintiff in error here, was complainant, and Jesse Appelgate, Cynthia Ann Appelgate, William Henry H. Appelgate, Daniel W. Appelgate (the latter the defendant herein), Charles Putnam, Peter Appelgate, James Fay, Charles Drain, John C. Drain, Jonas Ellensburg, and Alexander Appelgate were defendants.

The complaint further charges that this deed of the plaintiff in error casts a cloud upon his title to said land; that his deed of conveyance is prior to that to the plaintiff in error, and also prior to the commencement of the suit of Dowell against Jesse Appelgate *et al.* as above stated.

The complaint charges further that the validity of the said conveyance from William Henry H. Appelgate and wife to said Daniel W. Appelgate, defendant herein and plaintiff in said suit, was not in issue or determined by said decree.

Wherefore the plaintiff prays judgment and decree of the court, that the claim of defendant Dowell to said land be determined, and that he and all persons claiming through and under him be respectively enjoined from asserting said title against the title of the plaintiff to the lands described in the complaint, and that the cloud which it is alleged such deed creates or casts upon the title of the plaintiff to said land be removed, etc. (Record, 1–2.)

III.—Answer.

To this complaint the defendant Dowell interposed an answer (Record, 6), the principal denials and averments in which are as follows:

First. Denies that the plaintiff is, or ever was, prior to

the commencement of this suit, or at any time, the owner in fee simple, or had any other estate whatever in the land described in the complaint.

Second. Denies that the plaintiff derived his title, or any title, to said lands, or any part thereof, by purchase from William Henry Appelgate, or any other person, or in any other manner, or from any other source, but admits that plaintiff claims title through the said William Henry H. Appelgate.

Denies any knowledge as to whether he has a deed from William Henry H. Appelgate and Nancy Elizabeth Appelgate, or as to whether or not a deed was executed by William Henry H. Appelgate and Nancy Elizabeth Appelgate, his wife, purporting to convey said tract of land to the plaintiff.

Denies that the deed from William B. Gilbert, master in chancery, to the defendant Dowell casts a cloud on the title of plaintiff to the said forty acres of land, or any part thereof.

Denies that the deed from William Henry H. Appelgate and wife to the said forty acres of land was not in issue in the suit of B. F. Dowell against Jesse Appelgate and others, and denies that it was not determined by said decree.

And for a further and separate answer and defense to said complaint avers that the suit referred to and described in the complaint as pending in the Circuit Court of the United States for the District of Oregon was a creditor's bill of complaint to remove clouds on the title of the land of Jesse Appelgate, and to subject the same to the judgment liens of B. F. Dowell, plaintiff herein, against Jesse Appelgate's lands.

That William Henry H. Appelgate and Daniel W. Appelgate, plaintiff herein, and defendant in error, appeared in the said cause in the said Circuit Court of the

United States for the District of Oregon, and answered the said bill of complaint.

That one of the main issues in said suit was whether Jesse Appelgate, or William Henry H. Appelgate and Daniel W. Appelgate, were the owners of the north half of the donation land claim of Jesse Appelgate and his wife.

This answer further avers on the 5th day of January, 1883, the said Circuit Court of the United States for the District of Oregon duly made and entered its decree in said suit wherein the said court duly found, adjudged and decreed that on and prior to the 19th day of April, 1869, Jesse Appelgate was the owner in fee simple of one hundred and twenty-one and forty-five hundredths (121.45) acres of the north half of the donation land claim of Jesse Appelgate and wife, numbered 38, being a part of township 22 south, of range 5 west, of the Willamette meridian, situated in Douglas County, Oregon.

Further, that the conveyance of said one hundred and twenty-one and forty-five hundredths (121.45) acres of land by Jesse Appelgate to his sons, William Henry H. Appelgate and Daniel W. Appelgate, by deeds dated April 19th and April 20th, 1869, respectively, was voluntary and without any valuable consideration, and in fraud of the rights of B. F. Dowell, and is, as against him and his assigns, declared and decreed to be null and void.

And further, that the said Circuit Court of the United States for the District of Oregon further adjudged and decreed that B. F. Dowell, plaintiff in error here, had judgments duly entered in his favor against Jesse Appelgate and against the lands of Jesse Appelgate, and a lien on said one hundred and twenty-one and forty-five hundredths (121.45) acres of land, for the sum of $7,488.48, together with the costs of suit, and that the defendants in said suit, including said Daniel W. Appelgate, defend-

ant in error herein, were required by such decree to pay the same within twenty days, or the lands above described, with other tracts described in said decree, should be sold by William B. Gilbert, master in chancery, to pay the same.

This answer further avers that this decree was duly enrolled, and that it is still in full force and effect, and has never been reversed, altered, modified or annulled.

The answer further avers that subsequently, in 1883, said master in chancery duly sold said lands according to said decree, and that B. F. Dowell, plaintiff in error herein, became the purchaser thereof, for the sum of $7,400, and that afterwards said master in chancery duly made to him a deed according to said decree, and the same has been duly acknowledged and recorded in the record of deeds in the office of the county clerk of Douglas County, Oregon, and by means whereof such answer avers the said Daniel W. Appelgate, defendant in error herein, is estopped from disputing the title of the defendant, and from maintaining this suit.

This answer further avers that the forty-acre tract of land described in the complaint was and is a part of the one hundred and twenty-one and forty-five hundredths (121.45) acres hereinbefore described and included in said decree and sold by said master in chancery under said decree and conveyed by said master in chancery to B. F. Dowell, the plaintiff in error herein, as hereinbefore set forth.

For further and separate answer and defense to said complaint, the defendant therein, B. F. Dowell, alleges that the plaintiff, Daniel W. Appelgate, and his brother, William Henry H. Appelgate, at the time of the deed of Jesse Appelgate to William Henry H. Appelgate, and the deed from William Henry H. Appelgate to the plaintiff, that Daniel W. Appelgate well knew that Jesse Appelgate was largely indebted to the State of Oregon as

one of the sureties of Samuel E. May, late Secretary of State for the State of Oregon, and that both of said deeds were made with the intent to cheat and defraud the State of Oregon, and B. F. Dowell, plaintiff in error herein, one of Jesse Appelgate's co-sureties, out of said debt.

And further, that the said Circuit Court of the United States for the District of Oregon in the case of B. F. Dowell against Jesse Appelgate, William Henry H. Appelgate, and Daniel W. Appelgate, plaintiff and defendant in error herein, and others, duly adjudged and decreed that the deed of Jesse Appelgate to William Henry H. Appelgate for the land described in the complaint to be fraudulent and void as to the rights of B. F. Dowell, and ordered the land to be sold to pay B. F. Dowell his said debt as surety, with Jesse Appelgate, of Samuel E. May.

Such answer further avers that said William Henry H. Appelgate and Daniel W. Appelgate, defendant herein, received said deeds with the intent to cheat, delay, and defraud the State of Oregon and B. F. Dowell out of said debt; that such deeds were made and delivered without any valuable consideration whatever.

This answer further avers that the land described in the complaint was duly sold by the master in chancery as aforesaid, with other lands, under the decree aforesaid, and that B. F. Dowell became the purchaser of the land described in the complaint without any actual notice of the aforesaid deed of William Henry H. Appelgate to Daniel W. Appelgate, and without any notice that the plaintiff, Daniel W. Appelgate had any valid claim to the land described in the complaint of Daniel W. Appelgate against him, and defendant Dowell paid a valuable consideration for the same as the property of Jesse Appelgate.

It is further averred that the said forty-acre tract of land described in the complaint is a part of the donation

land claim of Jesse Appelgate and his wife, and the part in dispute was patented by the United States to Jesse Appelgate; that Jesse Appelgate and his wife deeded the same to William Henry H. Appelgate, and this deed by said decree was declared fraudulent and void as to the lands of the plaintiff in error, B. F. Dowell, by the decree in the Circuit Court of the United States for the District of Oregon hereinbefore described.

The answer further avers that there is no equity in the complaint, in this, that it shows there is a decree in the United States Circuit Court for the District of Oregon in favor of the defendant, and that he has a decree authorizing a writ of assistance to issue to put him into possession of the forty acres of land described in the complaint.

The answer further avers that the State Circuit Court has no power or authority to enjoin the United States decrees or orders, or to alter, change or modify them in any manner whatsoever.

This answer further avers that the complaint in this case shows on its face that the plaintiff, Daniel W. Appelgate, and William Henry H. Appelgate, were both parties to the proceedings and decree of the United States Circuit Court, and that no reason is given in the complaint why the plaintiff, Daniel W. Appelgate, neglected to set up his deed, or pretended deed, from William Henry H. Appelgate in the said cause in the United States Circuit Court.

The answer further avers that there is no averment in the complaint that William Henry H. Appelgate is, or ever was, the owner of the land now described in the complaint, although plaintiff claims his title by deed directly from him. Further, that there is no averment in the complaint that the plaintiff paid a valuable consideration for the land, or that he was an innocent purchaser from William Henry H. Appelgate without

notice of the equities of B. F. Dowell, or of the State of Oregon.

Therefore the defendant prays that he have the same relief as he would have had on demurrer of the complaint; that the suit be dismissed, and to recover his costs. (Record, 6–8.)

The plaintiff, by his attorneys, moved the court to strike out various portions separately of this answer as sham, frivolous, and irrelevant. (Record, 9–10.)

This motion was overruled in part, but sustained as to the ninth clause of such answer. (Record, 10.)

The portion of answer thus stricken extends from and including the 7th line from the bottom of Record, page 8, to and including the 15th line of page 9 of Record.

To this answer the plaintiff in said Circuit Court then interposed a demurrer, which after argument was overruled by the court. (Record, 12.)

Whereupon the plaintiff, Daniel W. Appelgate, defendant in error here, interposed a reply. (Record, 12.)

IV.—Reply.

In this replication, the plaintiff, Daniel W. Appelgate, makes denial:

That, in the suit of B. F. Dowell *v.* Jesse Appelgate and others, in the Circuit Court of the United States for the District of Oregon, set out in answer, one of the main issues was whether Jesse Appelgate or William Henry H. Appelgate and Daniel W. Appelgate were the owners of the north half of the donation land claim of Jesse Appelgate and his wife.

Denies that there was any issue in said suit as to whether Daniel W. Appelgate, the plaintiff here, was the owner of any portion of the north half of the donation

land claim of Jesse Appelgate and his wife, except certain admitted portions.

Denies that title of the plaintiff, Daniel W. Appelgate, to the land described in the complaint, or any part thereof, was an issue in any part of said suit of B. F. Dowell *v.* Jesse Appelgate *et al.*

Denies that he, Daniel W. Appelgate, is estopped from disputing the title of B. F. Dowell to the lands described in the complaint, or that Dowell's title is paramount to the title of the plaintiff, Daniel W. Appelgate, to the lands described in the complaint, and avers that the title of the defendant Dowell is subsequent and subject to the title of the plaintiff to all of the lands described in the complaint, and repeats that the defendant's title, or claim of title, is a cloud upon the plaintiff's title as charged in the complaint.

Denies further, and again, that the title of the plaintiff to the forty-acre tract of land described in complaint was an issue before the said Circuit Court in said cause, "or that said court had jurisdiction to include the same in said decree, or that the master in chancery had jurisdiction to sell the same under said decree or to convey the same to the defendant."

Denies that the deed of William Henry H. Appelgate to the plaintiff, Daniel W. Appelgate, was made with any intent to cheat and defraud the State of Oregon or B. F. Dowell, or any person, or that the same was received by plaintiff with any intent to cheat, delay, or defraud the State of Oregon or B. F. Dowell out of said debt, or any debt, or that said deed was made and delivered without a valuable consideration, and avers that he paid a full valued consideration for said forty acres of land; denies that said lands were duly sold by said master in chancery, or that said master in chancery had jurisdiction to sell and convey any valid title thereto to the defendant.

Denies that the defendant, B. F. Dowell, purchased

said lands without notice of the deed and record thereof of William Henry H. Appelgate to the plaintiff, Daniel W. Appelgate; avers that said deed was duly recorded on the 31st day of October, 1874, in the records of deeds of Douglas County, Oregon.

The plaintiffs for other and further reply deny that the Circuit Court of the United States for the District of Oregon had any jurisdiction to render or enter any decree set out in the answer of the defendant Dowell. Avers that such Circuit Court had no jurisdiction to entertain or try the suit in equity referred to in Dowell's answer in the case of B. F. Dowell *v.* Jesse Appelgate *et al.* Avers that said United States Court had no jurisdiction to render any decree in said suit, and that W. B. Gilbert, the master in chancery, had no power or jurisdiction to sell the lands described in said answer, or any part thereof; had no jurisdiction or authority to sell the lands as described in the complaint, or any part thereof, and had no jurisdiction to make a deed to the defendant Dowell as described in the answer, and avers that said deed is a void deed. (Rec., 12–14.)

V.—First Trial in State Circuit Court.

This cause, on these issues, came on for trial in the State Circuit Court in the county of Douglas, State of Oregon, at the special January term, 1887, when it was determined by the State circuit judge adversely to the plaintiff, Appelgate, and in favor of the defendant, Dowell, the court holding that it appeared from said Record of the Circuit Court of the United States for the District of Oregon, that the decree of said court, made and entered by said court on the 5th day of January, 1883, in the case of B. F. Dowell against Jesse Appelgate and others, the plaintiff in this cause, Daniel W. Appelgate being one of the defendants in said suit, is a bar to

this suit; and it was therefore ordered, adjudged and decreed that the plaintiff's complaint herein be dismissed, and the defendant Dowell have judgment for his costs disbursements, and such decree was entered. (Record, 16–17.)

On appeal being taken to the Supreme Court of the State of Oregon, the decree of the State Circuit Court was reversed, and the case was remanded to the court below for a new trial to be there had, on the issues joined in the pleadings of the said cause. (Record, 22.)

Appelgate *v.* Dowell, 15 Oregon, 513.

The cause again came on for trial in the State Circuit Court for the county of Douglas, State of Oregon, in the regular May term, 1888. Whereupon the court, after hearing the allegations, evidence and stipulations of the parties, made a finding of facts numbered, respectively, from one (1) to twelve (12). (Record, 24–43).

This finding of facts is authorized by Hill's Annotated Laws of Oregon, vol. 1, sec. 397 [393], which provides: That all issues of fact in suits in equity may be tried by the court, and in all suits the court, in rendering its decision therein, shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon, but all such findings of fact and conclusions of law shall be separate from the decree and shall be filed with the clerk, and shall be incorporated in and constitute a part of the judgment roll of said case; and such findings of fact shall have the same force and effect, and be equally conclusive as the verdict of a jury in an action at law.

Whereupon, in pursuance of the opinion of the Supreme Court, Appelgate *v.* Dowell, 15 Oregon, *supra*, the State Circuit Court entered a decree declaring the claim of defendant Dowell to the said land of no binding force

and effect, and perpetually enjoining and restraining him from asserting any title to the land in question thereunder. (Record, 42–43).

From this decree Dowell, the plaintiff in error here, appealed to the Supreme Court of the State of Oregon, when, on the 16th day of January, 1889, such Supreme Court affirmed the decree of the State Circuit Court. (Record, 46–47).

Dowell *v.* Appelgate, 17 Oregon, 299.

And from this latter final decree of the Supreme Court of the State of Oregon, Dowell brings the suit here on alleged error.

VI.

THE FOLLOWING BRIEFLY ARE THE FACTS WHICH LED TO THE SUIT BY DOWELL AGAINST JESSE APPELGATE, HIS WIFE AND OTHERS, WHICH WAS COMMENCED IN THE STATE COURT AND SUBSEQUENTLY REMOVED TO AND DECIDED IN THE CIRCUIT COURT OF THE UNITED STATES IN HIS FAVOR, AND THE VALIDITY OF THE DECREE IN WHICH CASE IS NOW UNDER CONSIDERATION.

THE FACTS.

The following facts are necessary to understand this case:

In June, 1862, S. E. May was elected Secretary of the State of Oregon, and on the 6th day of September, 1862, he gave his official bond in the sum of $10,000, with Jesse Appelgate, O. Jacobs, and James Kilgore as his official sureties.

At the June election, in 1866, May was again elected Secretary of the State of Oregon, and on the 6th of August, 1866, he gave his official bond, with Jesse Appelgate and B. F. Dowell as his official sureties.

May, under both bonds, became a defaulter to the

State of Oregon, amounting to large sums of money, and afterwards two suits were commenced against May and his official sureties, on various items of embezzlements of the money belonging to the State.

On the 26th day of June, 1874, the State recovered judgment against S. E. May, Jesse Appelgate, O. Jacobs, and Jas. Kilgore for embezzlements on the first bond in the sum of $1,622.69-100 and costs of the *action*.

And on the 11th day of August, 1874, the State *recovered* a judgment on the official bond for May's embezzlements against Jesse Appelgate and B. F. Dowell for $8,829.85-100 and the costs of the suit. That prior to June 27, 1874, Dowell had paid on said judgments to the State of Oregon, principal and interest, the sum of $10,837.78; and on that day he received a judgment against said Jesse Appelgate, his co-surety on said bond, and on account thereof for the sum of $4,882.19, which on that same date was duly entered on the judgment lien docket of said Douglas County, Oregon. That Dowell subsequently—November 16, 1878—paid the balance of said judgment in favor of the State, amounting to $1,385.61, and on due notice was subrogated to the rights of the State against Appelgate. That the total amount of Dowell's claim against Jesse Appelgate was on January 1, 1881, $6,584.09.

Deeds.

On the 5th of December, 1864, for the apparent sum of $1,500 Cyntha Ann Appelgate deeded to her husband, Jesse Appelgate, all her interest in their donation land claim in Douglas County, Oregon.

Afterwards Jesse Appelgate and his wife, Cynthia Ann Appelgate, made three sets of deeds to their children as follows:

1st Set.

To Wm. Henry H., 169 acres of their donation land claims for love and affection and an apparent consideration of $5 cash, dated 6th April, 1867, recorded 6th Feb., 1869.

To Daniel W., 160 acres of the same donation for the apparent consideration of $500 cash, dated 6th of Apr., 1867, recorded day of 1869.

2d Set.

To Wm. Henry H., 80 acres for love and affection and the apparent consideration of $1 cash, dated 19th April, 1869, recorded 6th May, 1869.

[This latter deed includes the whole of the 40 acres involved in this suit.]

To Daniel W., 80 acres for love and affection, and the apparent consideration of $1 cash, dated 20th of April, 1869, recorded May 5th, 1879.

To Charles Putnam, a grandson, 240 acres for love and affection, and the apparent consideration of $1, dated 1st April, 1869, and recorded 4th May, 1869; and Jesse Appelgate entered 40 acres in the name of Charles Putnam, making 280 acres on Pass Creek. To Peter, 170 acres of the donation claim, and 40 acres and 1.31-100 acres above the donation claim, making 211.31-100 acres.

3d Set.

To Sallie, 160 acres in Sec. 23, of Township 23 south, being the first Township south of the donation, and near John Long's donation claim, for the apparent consideration of $500, dated 9th Dec., 1871, recorded 9th Dec., 1871.

See supplemental bill of complaint (Record, 25–32).

The decree of the Federal Circuit Court in said case (Record, 38–41) declared fraudulent and null and void as against the claim of Dowell as a judgment creditor of Jesse Appelgate, not only the deed of Jesse Appelgate and wife to his son, William H. H. Appelgate, of date April 19, 1869, covering the property in dispute, and through which the plaintiff herein must, necessaril

rive title from his father, Jesse, but also the deed from Jesse Appelgate to his son, Daniel W., plaintiff herein, dated April 20, 1869, covering 80 acres in Jesse's half of said donation claim; and also the two deeds from Jesse Appelgate to his two sons, Daniel W. (plaintiff herein) and Peter, dated, respectively, April 20 and 21, 1869, covering some 200 acres of the wife's half of said donation claim; also the deed of date April 21, 1869, from Jesse to his son, Peter Appelgate, covering 40 acres of a tract outside of said donation claim; also the deed of date December 2, 1871, of Jesse Appelgate to his daughter, Sally Appelgate, afterwards Sally Long, covering 160 acres in a tract other than said donation claim, and declared that all the lands covered by all said deeds, amounting in all to about 540 acres, and including the land in controversy, together with the life estate of Jesse Appelgate in his deceased wife's half of his donation claim, be held subject to the lien of Dowell's judgments, and that the same be sold as upon execution for the purpose of satisfying the same, unless such judgments were paid within twenty days by the defendants in that suit, of which the plaintiff herein, Daniel W. Appelgate, was one.

Dowell *v.* Appelgate, 8 Sawyer, 427.

VII.—Assignments of Error.

1st. The Supreme Court erred in holding originally (Appelgate *v.* Dowell, 15 Oregon, 513), and in adhering to it in final decree (Dowell *v.* Appelgate, 17 Oregon, 299), that the said decree of the Federal Circuit Court did not operate upon, or affect the title of the plaintiff, Appelgate, derived under the deed from William H. H. Appelgate to him of date October 8th, 1874.

2d. The court below erred in holding in argument that the Circuit Court of the United States for the District

of Oregon had not jurisdiction to render the decree rendered therein in the case referred to in the Record.

3d. The court erred in arguing and in effect instructing the State Circuit Court that said decree of the Circuit Court of the United States for the District of Oregon was subject to collateral attack by a decision of the State Circuit Court.

4th. The State Circuit Court, as also the Supreme Court, erred in the 12th finding of fact (Record, 42) wherein it is found that the averment in Dowell's answer (Record, 7, 8) "that the plaintiff and his brother, William H. H. Appelgate, at the time the deed of Jesse Appelgate to William Henry H. Appelgate, and pretended deed from William Henry H. Appelgate to plaintiff, well knew that Jesse Appelgate was largely indebed to the State of Oregon as one of the sureties of S. E. May, late Secretary of State, and that both of said deeds were made with the intent to cheat and defraud the State of Oregon and B. F. Dowell, one of Jesse Appelgate's co-sureties out of said debt" was untrue.

5th. The court erred in affirming the judgment and decree of the State Circuit Court for the county of Douglas (Rec., 42) to the effect that the deed of W. B. Gilbert, master in chancery of the Circuit Court of the United States for the District of Oregon, mentioned in the tenth finding of fact (Rec., 42), conveyed no title or interest to the defendant Dowell in and to the real property described in the complaint in this suit, and in holding that plaintiff was entitled to a decree declaring the claim of defendant to said land of no binding force and effect, and perpetually enjoining and restraining him and all other persons claiming under, by, or through him, from asserting, or attempting to assert, any claim to

or interest in said premises, or any part thereof, and for his costs and disbursements in this suit expended.

6th. The court erred in affirming the decree of the State Circuit Court wherein it was decreed that the plaintiff, Daniel W. Appelgate have and recover a judgment against the defendant, B. F. Dowell, that his claim to the land described in the complaint is of no binding force and effect.

7th. The court erred in failing to hold that the plaintiff is estopped from asserting any claim to the land in controversy, under the deed to him from his brother William H. H. Appelgate of October 8th, 1874—

1st. By the decree of said Federal court; and,

2d. By his silence and acquiescence in Dowell's claim and purchase under said decree.

VIII.—The Merits.

Two principal questions, and only two, are involved in this case, as follows:

1st. Assuming the Federal Circuit Court had jurisdiction, did the decree rendered by that court in the case cited (Record, 38) operate upon or affect the title of the plaintiff to the land in controversy derived under the deed from Wm. H. H. Appelgate to him of date October 8, 1874; or, in other words, is the plaintiff estopped by that decree, assuming it is not open to attack collaterally, from asserting claim under that deed to the property in question; and,

2d. Is the decree of the Federal Circuit Court (Record, 38) subject to collateral attack in this case, and has this court the power under the pleadings and findings of fact in this collateral proceeding to declare the decree and

proceedings thereunder in the Federal Circuit Court void for want of jurisdiction?

The questions involved in the first proposition (*supra*) must be determined by an inquiry as to whether the claim of plaintiff in this case is one which either was actually determined, or which the plaintiff *might have litigated and had decided* in the case in the Federal court?

We answer, a careful examination of this Record will, in the light of the following authorities on the question of *res judicata* and estoppel, disclose the fact that the claim of plaintiff to the land in question is not only one which plaintiff had full opportunity to have litigated and decided in the case in the Federal court, but that the same was *actually* litigated therein and determined adversely to the plaintiff herein and in favor of Dowell.

IX.—Authorities.

Estoppel by Record.

Chief-Justice Marshall in Osborn *v.* The Bank of the United States, 9 Wheat., 738, said:

"To ascertain what is embraced in a cause, it is necessary to consider what will be concluded by the judgment, and a judgment is confessedly conclusive of every point *which might have been raised in pleading, whether it is or is not actually put at issue and determined.*"

"A former judgment between the same parties in which a claim was decided, *or was properly involved and might have been decided*, is a bar to another action or suit as to such claim."

So says this court in—

Stockton *v.* Ford, 18 How., 418.

The rule is that the judgment or decree of a court of competent jurisdiction is not only conclusive on all ques-

tions actually and formally litigated, but as to all questions which might properly have been raised and determined whether formally litigated and determined or not.

Authorities, *supra*—

Barrett *v.* Failing, 8 Oreg., 156;
Bellinger *v.* Croigne, 31 Barb., 357.

Freeman on Judgments, section 253, says:

"The identity of the subject-matter must appear. This is done where all the objections and matters of defense in the second action have been equally available in the first."

Beloit *v.* Morgan, 7 Wall., 609;
Cornwall *v.* County of Sacramento, 94 U. S., 351;
Davis *v.* Brown, *Id.*, 422.

Freeman on Judgments, section 249, says:

"The discovery of new evidence, not in the power of the party at the former trial, forms no exception to the rule in relation to estoppel, whether the second action is at law or in equity.

Freeman on Judgments and Estoppel, page 249, truly says:

"An adjudication is final and conclusive not only as to the matter actually determined, but as to *every other matter which the parties might have litigated and have decided* as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense."

In regard to the term "parties" as used in connection with the doctrine of estoppel, the law includes all who are distinctively interested in the subject-matter of the suit and had a right to make defense or to control the

proceedings and to appeal from the judgment, and the right to adduce testimony and to cross-examine the witnesses adduced on the other side, and to appeal from the decision if an appeal lies, only those who have enjoyed these privileges collectively should be concluded by a decision, judgment or decree.

Hermann on Estoppel and *Res Judicata*, vol. 1, sec. 135.

Judge Lord in Neil *v.* Tolman, 12 Oreg., 289, illustrates these principles and truly says:

"The rule is well settled that a party can not relitigate matters which he might have interposed but failed to do it."

Freeman on Judgments and Estoppel says:

"If either party omits to set forth and prove all the grounds of his right or his adversary's want of it, he can not correct his error by bringing another suit upon the portion or fragment of the case omitted.

Starr *v.* Stark, 1 Saw. C. C., 275.

In Hermann's late work on Estoppels and *Res Judicata*, 1st volume, section 409, several cases are given directly in point, and he cites the following authorities:

Young *v.* Babylon, 91 Pa. St., 280;
Wright *v.* Dunning, 46 Ills., 271;
Nichelus *v.* Dibbell, 61 Tex., 539;
Chapman *v.* Chapman, P. F. Smith, 214.

In Edwards *v.* Stewart, 15 Barb., 67, it was held that the recovery by a physician of a judgment upon his claim for professional services was a conclusive affirmance of the valuable character of those services, and as such, the judgment therein is a bar to any action against him for malpractice, although the former judgment was rendered without any claim for malpractice.

ARGUMENT.

Point I.

Applying the rules so clearly recognized by these authorities to the case at bar, it is clear the plaintiff is estopped by this decree from now setting up a claim of title under his deed of October 8, 1874.

And in this connection we insist—

1st. That all claim of title which plaintiff had to the land in question, from whatever source, was actually litigated and determined in the case in the Federal Circuit Court, and by the decree in that case he is estopped; and—

2d. If by any possibility we are mistaken in this contention, then we contend that the plaintiff had full legal opportunity to have such claim litigated and determined in said case, and hence he is equally estopped.

It will be borne in mind the Supreme Court of the State of Oregon, while indulging in an argument calculated and intended to show that in the judgment of the writer of the opinion in that case the Federal Circuit Court had no jurisdiction of the case cited in this Record, refrained in opinion from deciding the question as to whether the decree in that case was open to collateral attack. The court (Appelgate *v.* Dowell, 15 Oreg., 529), said:

"Whether the said decree is vulnerable to collateral attack or not we do not, for the reasons before suggested, undertake to decide."

And yet the decree finally rendered (Record, 43) does, as a matter of fact, attack such decree for want of jurisdiction *as to the land in controversy.*

The *sole* ground then on which the Supreme Court of

Oregon reversed the first decree of the State Circuit Court (Appelgate *v.* Dowell, 15 Oreg., 529), and thus prescribed the rule which was followed by the State Circuit Court in its second decree, and by the Supreme Court adhered to in its second and final decree (Appelgate *v.* Dowell, 17 Oreg., 299), was as follows:

"That the said decree of the Federal Circuit Court, plead in bar by Dowell in this suit, did not," to use the language employed by the court in its opinion, 'operate upon or affect the title of Daniel W. Appelgate derived under deed from William H. H. Appelgate of October 8, 1874.' "

It is respectfully submitted this is error and for the following reasons:

It is conceded (see Findings of Fact 1, 2, 3, Record, 24) that the forty acres of land in controversy in this suit is a part of the north half, or in other words, the husband's half of Jesse Appelgate's donation claim. What was the issue then tendered by the bill of complaint of Dowell in the Federal Circuit Court? What was his claim as asserted in that bill as to the whole of that half of said donation claim? It was that the same and the whole thereof had been conveyed by Jesse Appelgate to his two sons, William H. H. Appelgate and Daniel W. Appelgate, the latter being the plaintiff herein, in fraud of the rights of the State of Oregon and of the defendant Dowell, Jesse Appelgate's creditors; and he further demanded in that complaint that the said land and the whole of it be declared and held subject to the payment of said debts of Jesse Appelgate, and that whatever claims the said sons had thereto be cancelled and set aside. These two sons were made parties to the suit. They were both brought into court, and each appeared and filed answer (Record, 34), in which they traversed the issue thus presented by the bill of complaint. The

plaintiff, Dowell, in his bill, it is true, referred to certain deeds by date, under which he understood these two sons made claim respectively to the land, including the forty acres now in dispute, but did not, having no actual knowledge of its existence, refer in his bill to an alleged mesne conveyance from the one son, William H. H. Appelgate, to the other son, his brother, Daniel W. Appelgate, of date October 8, 1874, and under which respondent, Daniel W. Appelgate, now claims to hold the forty acres as against the decree of the Federal court. But that decree, it is submitted on the issues thus presented, not only operated on those deeds under which the two sons claimed, which were set out in the bill of complaint, but on every deed held by them and through which they claimed title from their father, Jesse Appelgate, whether mentioned in the bill or not, and on all title derived under each thereof, and on all the land which the Federal Circuit Court decreed had been fraudulently transferred by him to his sons. That decree, after declaring the two deeds from Jesse Appelgate to his two sons, William H. H. Appelgate and Daniel W. Appelgate, of dates respectively, April 19 and 20, 1869, fraudulent and void, and which covered all the land in controversy, declared as follows:

"That unless the defendants, Jesse Appelgate, Peter Appelgate, Daniel W. Appelgate (the latter the plaintiff in this case), and Sally Appelgate, pay the sum of $7,488.48 (judgments held by Dowell against Jesse Appelgate) to the plaintiff herein, together with costs and disbursements, to be taxed within twenty days from the entry of this decree, the master of this court, Mr. William B. Gilbert, is authorized and required to sell as upon an execution at law all the interest of said Jesse Appelgate *on January 1, 1869*, in the above-mentioned and described premises, to wit." (Record, 42–43.)

Then follows in the decree a specific description of the whole of the north half of said Jesse Appelgate's donation

claim, except 200 acres (Record, 39), more or less, conveyed by W. H. H. Appelgate on June 24, 1871, to Charles and John C. Drain.

Point II.

IF PLAINTIFFS' CLAIM WERE NOT ACTUALLY LITIGATED AND DETERMINED IN THE CASE IN THE FEDERAL COURT IT WAS PROPERLY INVOLVED THEREIN, AND MIGHT AND SHOULD HAVE BEEN DETERMINED; HENCE THE ESTOPPEL OPERATES.

This is not a case where the plaintiff was not informed as to all his rights or claims to the property in question when he made answer to the bill in the Federal Circuit Court. Upon the contrary, he, as a matter of course, had *actual* knowledge of the deed from his brother, Henry Appelgate, to him of October 8, 1874, while, upon the other hand, Dowell had no *actual* notice, but only *constructive* notice of the existence of such deed. This is conceded in plaintiff's reply (Record, 14).

Dowell in his answer (Record, 7) says:

"And B. F. Dowell became the purchaser of the land described in the complaint *without any actual notice* of the pretended deed of Wm. H. H. Appelgate to Daniel W. Appelgate, and without any notice that the plaintiff, Daniel W. Appelgate, had any further claim to the land described in the complaint, * * * and paid a valuable consideration for the same as the property of Jesse Appelgate."

To this averment Appelgate replies, making no denial of actual notice, but avers his deed was recorded (Record, 14).

It was not only a *right* upon the part of the plaintiff, Daniel W. Appelgate, but his *duty* to assert his claim in the Federal court to the land in question arising out of his deed of October 8, 1874. Not only law but equity

and good morals required him to do it. Not having done so, to allow him to assert such claim now would be through the forms of law and the aid of the judiciary to permit the perpetration of a fraud upon the defendant Dowell.

Although he had the right to assert this claim in the Federal court, he purposely and willfully withheld the same with a view to cheat and defraud, if possible, whoever might become the purchaser of the land under the decree of the Federal Circuit Court, whether B. F. Dowell or some other equally innocent purchaser. The law as well as good morals join in demanding that he be forever estopped from asserting title to any part of the land embraced in the decree of the Federal court.

Freeman on Judgments and Estoppel, 249, 250.

The object in making a person a party to a suit is to enable him to be heard and to assert his rights. And to the end, if he fail to set them up that he may be concluded from again litigating them. As for instance in a proceeding for partition the widow was made a party, the petition alleged that she was entitled to dower and the court adjudged it to her; commissioners were appointed to assign dower; they reported it could not be done, and the court thereby decreed her a yearly allowance in lieu of dower and made it a lien upon the land. The lands were sold under the petition, proceeding subject to the payment of the annuity. The widow made no claim to homestead, and the court held her estopped from afterwards setting up a homestead right against the purchaser under the partition sale.

Freeman on Judgments, sec. 249.

So where an unmarried woman, the head of a family capable of releasing the homestead and occupying it, fails to assert her right when a court is called upon to

pass upon it in a suit to which she is a party, she will be concluded.

Again, where a person, not under a disability, is sued and the homestead is involved, it will be affected by any neglect to assert it, precisely as any other right.

Hermann's Law of Estoppel, sec. 409;
Wright *v.* Dunning, 46 Ills., 271.

Again, a person having an equitable defense to an action and being authorized under the law to interpose it by answer, is bound to do so, and if he does not, he is estopped from bringing a separate action merely for the purpose of restraining the prosecution of another action pending in the same court.

Winfield *v.* Bacon, 24 Barb., 154;
Foote *v.* Sprague, 12 How. Pr., 355;
Farmin *v.* Thomassen, 45 Ga., 553.

Mere silence will postpone a title where one knowing his own right suffers his silence to lull to security an innocent purchaser, instead of warning him of danger.

Chapman *v.* Chapman, 9 P. F. Smith, 214.

A party who stands by at a sale of his own property, though under a void authority, and encourages a purchaser to bid is guilty of a direct fraud and will be estopped from alleging title against such purchaser.

Moss *v.* Van Swearington, 10 S. & R., 145.

No less is a person estopped who, when he has full opportunity to assert his claim both in court and out of court, stands by and permits a sale of his own property under a judicial decree. In such a case a person is estopped from making subsequent claim to the same property.

Epler *v.* Witherow, 7 Watts, 165;
Carr *v.* Wallace, *Id.*, 400;
91 Pa. St. Reps., 283.

If a person with full knowledge permits another, without objection, to sell his property as the property of the vendor, he will be estopped from questioning the title of a *bona fide* purchaser.

1 Brewster *v.* Striker, 2 N. Y., 19.

Why is not a sale made under a decree of a chancery court still stronger, as a court of equity can not be presumed to authorize the sale of a defective title?

Maddock's Chancery, 430.

A party, if he stands by and permits his own land to be sold on void authority, without making an objection, will be estopped.

10 S. & R., 145;
Epley *v.* Whiterow, 7 Watts, 165;
Carr *v.* Wallace, *Id.*, 400.

Point III.

If it were true, and the Record clearly shows it is not true, that plaintiff was an innocent *bona fide* purchaser from his brother, of the land in controversy, who, it is conceded, was the fraudulent vendee from his father, Jesse, then plaintiff, Daniel W. Appelgate, by concealing his claim under his deed of October 8, 1874, during the progress of the suit in the federal court, prevented Dowell from making claim in that suit, as he otherwise would have had the right to do, against William H. H. Appelgate, plaintiff's vendor, for the amount of the purchase money received by him from the plaintiff, Daniel W. Appelgate.

In Williamson *v.* Williams, 11 Lea. (Tenn.), 370, the fraudulent vendee had sold land to a *bona fide* purchaser, and it was said that having deprived the creditor of the property and obtained its price, he must be held responsible by reason of this fraudulent disposition of the prop-

erty to the amount of the consideration received by him. The money stood for the lands in his hands.

Wait on Fraudulent Conveyances and Creditors' Bills, sec. 178; Wheeler *v.* Wallace, 53 Mich. 355.

"The property in the hands of a fraudulent purchaser is held by him in trust for the creditors of the fraudulent vendor, and where the property is converted into money the fund thus created is impressed with the same trust."

Ferguson *v.* Hillman, 55 Wis., 190; Wait, sec. 177.

Applying the principle enunciated in the foregoing authorities, it follows: That had plaintiff in the suit in the Federal Circuit Court asserted his claim under his deed of date March 8, 1874, as he should have done, he could, if he could have shown he was a *bona fide* purchaser under that deed, have obtained a decree in that suit recognizing his title under that deed, and at the same time have enabled Dowell to obtain a decree against Wm. H. H. for the amount of the purchase money paid by plaintiff.

Can it be successfully contended for one moment that the plaintiff herein, Daniel W. Appelgate, with full actual knowledge of the existence of his deed from his brother of October 8, 1874, for the 40 acres in question, and which was a part of the 121.55-100 acres in controversy in the suit in the Federal court, and with full knowledge of Dowell's claim in that case to have the whole of said 121.55-100 acres held subject to the satisfaction of his judgment against Jesse Appelgate, and being a party to the suit, having appeared therein and made answer, and with full power to assert every claim he is now asserting with the right to be heard in pleading, in evidence, in argument and on appeal, can be permitted to conceal his claim under said deed of October 8, 1874, to stand quiescent, and permit a decree to be entered in favor of Dowell, and judicial sale to be made

thereunder and a purchase of the land in question by Dowell at its full value? It is respectfully submitted he can not be permitted to do so, except on condition that he shall be forever precluded from setting up claim to such land. It is respectfully insisted, therefore, there is in this case a *double estoppel* operating against the plaintiff herein as follows:

1st. He is estopped by the decree of the Federal court; and,

2d. He is estopped by his remaining silent when he had full opportunity to be heard, and when it was his duty to assert his claim, if he had one, and he can not be permitted to assert it now.

Point IV.

THE PLAINTIFF CAN NOT BE CONSIDERED IN THE LIGHT OF THE RECORD IN THIS CASE AND IN VIEW OF SECTION 3063 OF HILL'S ANNOTATED LAWS OF OREGON AS A *bona fide* PURCHASER.

Section 3063 of the Oregon Code, *supra*, is as follows:

"The provisions of Titles II, III, and IV of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor *or* of the fraud rendering void the title of such grantor."

A critical examination of the pleadings in this case and of the findings of fact upon which the court below acted will disclose the validity of the above proposition. Dowell in his answer in this case (Record, 7, 8) says:

"For a further and separate answer and defense to said complaint, the defendant alleges that the plaintiff herein and his brother, William H. H. Appelgate, at the time

of the deed of Jesse Appelgate to William Henry H. Appelgate and the pretended deed from William Henry H. Appelgate to the plaintiff, *well knew* that Jesse Appelgate was largely indebted to the State of Oregon as one of the sureties of S. E. May, late Secretary of State, and both of said deeds were made with the intent to cheat and defraud the State of Oregon and B. F. Dowell, one of Jesse Appelgate's co-sureties, out of said debt."

It is respectfully and confidently insisted that the above averment in Dowell's answer in so far as it relates to the deed from Jesse Applegate to William H. H. Appelgate, and in so far as it charges that plaintiff "well knew," at the time that deed was made, and also at the time Wm. H. H. deeded to him, that Jesse Appelgate was largely indebted, &c., as stated, is nowhere denied in the reply of plaintiff, either directly or inferentially. It follows, therefore, under the Oregon statutes, and under every system of pleading under a code, that a material averment in the complaint, not denied in the answer, as a material averment in the answer as to new matter, and not denied in the reply, must be taken as admitted and as true for all the purposes of the case. This being so, it is respectfully and confidently contended that the State Circuit Court grievously erred in its twelfth finding of fact (Record, 42), wherein, after reciting that no evidence was offered on certain points, said: "And I, therefore, find that said allegations, and each and every one of them are untrue" in so far as such finding has any relation to the charge in Dowell's answer that plaintiff had knowledge, at the time he took his deed of 1874 from his brother, of the fraudulent character of the transaction between Jesse Appelgate and his brother. Such finding was directly in the face of an admission in the pleadings as to a most material averment. Dowell was not called upon to offer any testimony proving or tending to prove an averment in his answer which had not

been denied in the reply. Therefore it follows, necessarily and absolutely, that such finding was erroneous, having no warrant in the pleadings or evidence in the case; and it therefore follows further, clearly, that the plaintiff in this case can not be considered in the light of a *bona fide* or innocent purchaser. He stands in no better light than did his brother, his vendor, whose deed from his father was declared fraudulent and void by the Federal Circuit Court, and on grounds of which plaintiff had knowledge when he took the deed of 1874. Moreover it must not be forgotten that long prior to October 8, 1874, when plaintiff received his deed from his brother Wm. H., and under which he claims he is a *bona fide* purchaser, two actions had been brought by the State of Oregon on the two bonds of defaulter May; one on the first bond of date September 6, 1862, against S. E. May as principal, and Jesse Appelgate, O. Jacobs, and James Gilmore as sureties, and the other on the second bond of date August 6, 1866, against S. E. May as principal and Jesse Appelgate and B. F. Dowell as sureties; and judgment had been rendered in the former case June 24, 1874, for $1,622.69, and in the latter case, August 4, 1874, for $8,929.85, making a total of judgments on the two bonds of $10,552.54 (Record, 25–26); the latter judgment of $8,929.85 having been rendered less than two months prior to the deed of October 8, 1874, under which plaintiff claims title.

Point V.

CAN THIS COURT IN THIS COLLATERAL PROCEEDING, UNDER THE PROCEEDINGS AND FINDINGS OF FACT IN THIS CASE, HOLD THE DECREE OF THE FEDERAL CIRCUIT COURT AND PROCEEDINGS THEREUNDER VOID FOR WANT OF JURISDICTION? WE ANSWER, NO.

In considering this question it must be borne in mind this case is here on writ of error from the Supreme Court of a State. That the decree of the Federal court, brought in question collaterally in the State court was not by that court held to be void for want of jurisdiction of the parties to that cause, but did hold that the decree, in so far as it sought to subject the land in controversy here to the satisfaction of the debts of Jesse Appelgate, *was void;* and in this respect, and to this extent, the court below assumed the responsibility of declaring the decree and proceedings thereunder void for want of jurisdiction of the subject-matter.

This we respectfully insist neither the State Court nor this court has any right to do. And—

Point VI.

THE PLEADINGS ARE INSUFFICIENT TO RAISE A QUESTION AS TO THE JURISDICTION OF THE FEDERAL COURT.

1st. It is submitted the pleadings in this case, upon the part of plaintiff, do not suggest any ground of lack of jurisdiction in the Federal court.

There is no question made in the complaint as to the lack of jurisdiction of the Federal court, although the decree of the court in said case is referred to, and the master's sale and deed thereunder. The only claim of the

complaint is that his (plaintiff's) deed is *prior* in time to that of Dowell's acquired under the decree (Record, 2).

The answer of Dowell sets out the case in the Federal Circuit Court, giving the parties, pleadings, decree, and sale thereunder (Record, 6).

The plaintiff then, in his reply for the first time, attempts to question the jurisdiction of the Federal court, and it is respectfully submitted his pleading is wholly insufficient.

Provident Savings Society *v.* Ford, 114 U. S., 640.

In the case (*supra*) this court said:

"Want of jurisdiction set up to avoid a judgment must be shown with the greatest certainty."

It will be noticed the pleadings in the present case state no reason why the Federal court did not have jurisdiction. It does not appear from the pleading whether it was a lack of jurisdiction of parties or of subject-matter, unless, indeed, it can be held that the single claim made in the reply to the effect that the title of the plaintiff to the forty-acre tract of land described in the complaint was not in issue before the Federal Circuit Court is an averment of want of jurisdiction as to subject-matter.

It is conceded if this decree of the Federal Circuit Court were here on writ of error or appeal direct from that court that the question of jurisdiction could be raised here by either party or by the court on its own motion without any *plea* to the jurisdiction; but we insist the rule is different where it is sought in this collateral manner to attack and declare void the decree of a Superior Court and proceedings had thereunder for want of jurisdiction, and that in such case there must be a valid plea pointing out the reasons for lack of jurisdiction, and these, moreover, must be such as are apparent on the face of the record attacked.

This court, in Provident Savings Society *v.* Ford (114 U. S., 635), held that in a suit against a corporation in a court of the State from which its charter is derived, to recover on a judgment recovered against it in a Circuit Court of the United States in a district within the limits of another State, a petition by the defendant for the removal of the cause into the Circuit Court of the United States, which alleges that the defendant was not an inhabitant of the latter State, and was not personally served with process by itself or its officers, but does not allege that there was no service of process on an agent of the corporation in the district in which the judgment was recovered, and that there was no appearance of the defendant in the suit, is not a sufficient averment to raise a defense of want of jurisdiction under the Revised Statutes, section 739, the court holding that the affidavit for removal in that case should have negatived service of process on an agent of the defendant in Ohio, and also the actual appearance of the defendant to the suit, and this court then said:

"For want of jurisdiction set up to avoid a judgment must be shown with the greatest certainty."

Point VII.

THE DECREE OF THE FEDERAL CIRCUIT COURT IS CONCLUSIVE AS TO THE LAND IN QUESTION. IT IS NOT VULNERABLE TO COLLATERAL ATTACK.

"The United States Courts are courts of limited jurisdiction, yet they are not inferior courts and their judgments and decrees have the same conclusive effect as all other judgments until reversed or annulled, and they are of such binding effect that although the Record does not show any jurisdiction, the rights of third parties dependent upon it can not be in any way impaired in any collateral

proceedings as long as the judgment is unreversed or unannulled."

Hermann on Estoppel and *Res Judicata*, vol. 1, sec. 132;
McCormick *v.* Sallient, 10 Wheat, 192;
Walker, *ex parte*, 3 Pet., 193;
Kennedy *v.* Bank, 8 How, 586;
Hough *v.* Hutchinson, 14 How., 386.

The decree of the United States Circuit Court, unless absolutely void upon its face, estops the plaintiff from claiming title to any part of the land included in said decree. He can not collaterally attack such decree, except for jurisdictional defects clearly apparent on the face of the Record.

Pratt *v.* Dow, 56 Me., 181;
1 Freeman on Judgments, sections 131, 134;
Turrell *v.* Warren, 25 Minn., 9;
Ex parte Cuddy, 9 Sup. Ct. Rep., 703;
Stearns *v.* Aquirrel, 7 Cal., 450.

"A judgment is final and conclusive upon all matters which might have been litigated and decided in the action and as to matters which might have been used as a defence in that action, which if again considered would involve an inquiry into the merits of the former judgment."

So said Peckham, judge, in the case of Bell *v.* Merryfield, 109 N. Y., 203, approving the doctrine laid down by the same court in Hale *v.* Bank, 49 N. Y., 626.

"The form of the judgment or decree in suits to annul fraudulent transfers, or to reach equitable assets and the rights secured by the adjudication, constitute important branches of our subject. The usual attributes attach to the judgments in this class of cases. It is regarded as an estoppel upon the parties as to the subject-matter investigated."

Wait on Fraudulent Conveyances and Creditors' Bills, sec. 168.

The decree in this case declares Dowell's judgment a lien against the land in question *as of a date prior to the date of the deed under which plaintiff claims title.* That decree has been enforeed by sale on execution issued out of said Federal Circuit Court and Dowell became the purchaser. That sale has been confirmed by the court, and under order of the same court a deed conveying the property to him has been executed and delivered. Whether there was error in that or not, is a matter of no consequence; it is binding on plaintiff until reversed on appeal or attacked directly by a writ of review and set aside for fraud.

As stated by Chief Justice Marshall in the case of. *Ex Parte* Tobias Watkins, 3 Pet., 207:

"It is universally understood that the judgments of the Courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error."

Indeed, so jealous are courts in upholding their decrees and mandates that Chief Justice Marshall, in his celebrated opinion in the leading *habeas corpus* case of *Ex Parte* Tobias Watkins, 3 Pet., 206, cited with approval a previous decision of this court in the following language:

"In Skillern's Executors *v.* May's Executors, 6 Cranch, 267, a decree pronounced by the Circuit Court for the district of Kentucky had been reversed, and the cause was remanded to that court, that an equal partition of the land in controversy might be made between the parties. When the cause again came on before the court below it was discovered it was not within the jurisdiction of the court, whereupon the judges were divided in opinion whether they ought to execute the mandate and their decision was certified to this court. This court certified that the Circuit Court is bound to execute its mandate, 'although the jurisdiction of the court be not alleged in the pleadings.' The decree having been an-

nounced, although in a case in which it was erroneous for want of averment of jurisdiction, was nevertheless obligatory as a decree."

Ex Parte Tobias Watkins, 3 Pet., 206.

The rule laid down over ninety years ago, in the celebrated case of Le Guen *v.* Gouverneur & Kemble, reported in 1st Johnson's Chancery Cases, 2d ed., 436, correctly states the law in the following language:

"Where a party to a suit-at-law has knowledge of a fraud or other matter of defence, in time to avail himself of it at the trial at law, and he neglects to do so, he can not afterwards obtain relief in a court of equity against the judgment at law, on the ground of such fraud or matter of defence that he might have set up at the trial, but is forever concluded by the judgment."

The principle here enunciated is applicable to the case under consideration.

In Ferrier's case, 6 Coke, 7, the vice chancellor, in disposing of the case, said:

"Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because the party has, from negligence, omitted part of his case."

And he further added—

"That the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. (Henderson *v.* Henderson, 3 Hare,

ch. 115; Bagot *v.* Williams, 3 B. & C., 241; Roberts *v.* Heine, 27 Ala., 678; Safford *v.* Clark, 2 Bing., 382; Miller *v.* Covert, 1 Wend., 487.)"

"In the case of Gardner *v.* Buckbee (3 Cowen, 120), it was held by the Supreme Court of New York that a verdict and judgment in the Marine Court of the City of New York upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the court of Common Pleas."

And this authority is quoted with approval in the opinion of this court in Cromwell *v.* County of Sacramento 94 U. S., 354, *supra*. (Miles *v.* Caldwell, 2 Wall.)

Mr. Justice Field, in Cromwell *v.* County of Sacramento (94 U. S., 351), after stating the rule as to estoppel, said:

"Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as the proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy."

Point VIII.

The Oregon Statutes.

The Oregon Legislature has incorporated the principles enunciated in the preceding authorities into the statutes of that State.

Section 3059, Hill's Annotated Laws of Oregon, Vol. 2, Title 4, provides as follows:

"Every conveyance or assignment in writing or otherwise of any estate or interest in lands or in goods or things in action, * * * made with the intent to delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands * * * as against the persons so hindered, delayed, or defrauded, shall be void."

Section 733, Hill's Annotated Laws of Oregon, provides as follows:

"The effect of a judgment, decree, or final order in an action, suit, or proceeding before a court or judge thereof of this State, or of the United States, having jurisdiction to pronounce the same, is as follows:

"'1st. In case of a judgment, decree, or order against a specific thing, * * * the judgment, decree, or order is conclusive upon the title to the thing.'" * * *

Section 735:

"The parties are deemed to be the same when those between whom the evidence is offered were adverse to each other in the former case, and a judgment, decree, or other determination could in that case have been made between them alone, though other parties were joined with both or either."

Section 741:

"Any judicial record may be impeached and the presumption arising therefrom overcome by evidence of a want of jurisdiction in the court or judicial officer, or collusion between the parties, or of fraud in the party offering the record in respect to the proceedings."

Point IX.

THE RECORD OF THE SUIT IN THE FEDERAL CIRCUIT COURT DOES NOT DISCLOSE A LACK OF JURISDICTION EITHER AS TO PERSONS OR SUBJECT-MATTER.

It is respectfully insisted, first, that it does not appear affirmatively from the Record that the Circuit Court of the United States for the District of Oregon was without jurisdiction either as to the persons or subject-matter in controversy in that suit, including the land in controversy in this suit, and for the following reasons:

1st. There is nothing in the Record from beginning to end (see Record, Findings of Fact, 1–12), which shows, or from which it can be inferred, that the plaintiff and defendants in that suit were citizens of the same State when the suit was commenced in the State Circuit Court.

That suit, it will be remembered, was not one originating in the Federal court, but was commenced originally on the 11th day of October, 1879 (Record, 33), in the State Circuit Court for the county of Douglas, and subsequently removed to the Federal court. No part of the pleadings in the State court accompany the Record in this case; hence this court is not advised as to the character of the allegations in either the complaint, answer or reply in the State court as to the citizenship of the parties.

It is true when the supplemental bill was filed in the Circuit Court of the United States, April 6, 1881 (see Record, 25–32, 5th Finding of Fact, Record, 25) to conform to the practice of the Federal court, which was eighteen months subsequent to the date of the commencement of the suit in the State Circuit Court, the statement is made that the plaintiff and the defendants in that suit were all citizens of the same State. There is

nothing, however, in that supplemental bill, or in any part of the Record, to show the citizenship of the parties prior to that date.

Nothing is presumed against the jurisdiction of a court of record. Therefore the fact that it appears for the first time in a pleading filed months after the case has been removed to a Federal court that the citizenship of the parties is *then* such as would have prevented the court from taking jurisdiction on the ground of the citizenship of the parties is not sufficient to justify the conclusion that the court did not have jurisdiction by reason of the adverse citizenship of the parties at the time of the commencement of the suit in the State court and its removal into the Federal court.

The citizenship which controls jurisdiction is citizenship at the time suit is commenced or transferred.

Mollan *v.* Torrance, 9 Wheat., 537;
6 Curtis, 172;
Morgan Heirs *v.* Morgan, 2 Wheat., 297;
4 Curtis, 110;
Carpentier *v.* City of Oakland, 30 Cal., 448.

The suit having been removed from the State court, the Federal court, by proceeding to adjudicate the controversy, passed judgment upon the question of its own jurisdiction, and that judgment is impregnable to collateral attack.

1 Freeman on Judgments, 134;
Des Moines *v.* Iowa Homestead Co., 8 Scr., 217;
123 U. S., 522;
Girardi *v.* Beeseman, 77 Ga., 483.

As bearing upon the question of the jurisdiction of the Federal court, whose decree is involved in this case, it must be borne in mind that in that case there were no less than ten defendants, each and all of whom, it appears from the Record, made answers, and yet in the case under

consideration not a single one of these answers is disclosed or made a part of the Record, save and except that of Daniel W. Appelgate, the plaintiff in the court below and respondent here. It follows, therefore, that the courts below, both the State Circuit and the Supreme Court, essayed to declare a decree of the Circuit Court of the United States for the District of Oregon void for lack of jurisdiction in that court, when neither the original complaint filed in that case in the State court before its removal to the Federal court, nor any part of any of the pleadings in that court, nor any part of the affidavit, bond, petition, or other proceedings looking to the removal of the cause from the State to the Federal court, and no one of the nine answers, either joint or otherwise, of the defendants in that case was before the court.

Unless it appears on the face of the Record in the case that the Circuit Court of the United States for the District of Oregon had no jurisdiction to render the decree rendered therein, then it is clear that neither the State-Circuit, or Supreme Court had any authority or jurisdiction to enjoin such decree of the Circuit Court of the United States or to stay proceedings under it.

It has been adjudged frequently that no State court has authority or jurisdiction to enjoin a judgment of the Circuit Court of the United States or to stay proceedings under it. This was attempted by a State court in Kentucky, and declared to be of no validity by the Supreme Court of the United States.

McKim *v.* Voohis, 7 Cranch, 279;
Kent, 410.

Point X.

THE RECORD IN THE CASE IN THE FEDERAL CIRCUIT COURT SHOWS CLEARLY ON ITS FACE FACTS CONFERRING JURISDICTION, BUT IT MAY NOT SHOW CERTAIN OTHER FACTS WHICH OF THEMSELVES WOULD CONFER JURISDICTION, SUCH AS DIVERSE CITIZENSHIP OF THE PARTIES; NOR ARE THESE FACTS NEGATIVED BY ANYTHING IN THE RECORD.

While, therefore, there is nothing on the face of the Record showing lack of jurisdiction, in which event jurisdiction will be presumed where the attack is made collaterally, and not on appeal or writ of error, there is sufficient appearing on the face of the Record in that suit to show conclusively jurisdiction in the Federal court.

First, the bill therein seeks to subject the lands in question to the satisfaction of Dowell's judgment against Jesse Appelgate, and the complaint alleges (Record, 25) that the said deeds adjudged void are void because executed in fraud of the revenue laws of the United States by failure upon the part of the grantor to put on the necessary revenue stamps, and *that this failure was the result of an intent on the part of the grantors of avoiding the provisions of the said statutes;* that is to say, the act entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt," approved June 30, 1864, and the amendments thereto.

This averment tendered an issue on a question of Federal cognizance; that is to say, the interpretation of said internal revenue laws, and brought the case within the constitutional provision—" cases arising under the laws of the United States," and therefore removable to the Federal Circuit Court under the act of 1875. The defendants therein all joined issue thereon. True, there were other questions involved, but if this one issue had been determined by the court in favor of Dowell then his case would

have been made; for, if the deeds made by Jesse Appelgate and wife were void by reason of not having been properly stamped, then they passed no title to the grantees, the property remained the property of Jesse Appelgate, and, of course, was subject to his debts.

Act of March 3, 1865, 13 U. S. Stats., 481;
Hatch *v.* Willamette Iron Bridge Co., 6 Fed. Rep., 326;
Hugh *v.* Northern Pacific R. R. Co., 18 Fed. Rep., 106;
Pacific R. R. Removal Cases, 5 S. C. Rep., 1213;
Texas Pacific R. R. Co. *v.* Cox, 12 S. C. Rep., 905

The averments on this subject in Dowell's supplemental bill in the Federal Circuit Court (Record, 29, 30) are as follows:

"That the actual price paid the said Appelgate for said land was $2,000. Yet the deed, to conceal the value of the land and to cheat and defraud the creditors of Jesse Appelgate * * * on its face only expresses the consideration of $500, and it, in place of having a revenue stamp of $2, as was required by the act of Congress at the date of said deed, only has a revenue stamp of 50 cents on it, and he is advised by his counsel that each and all of said deeds of William H. H. Appelgate, David W. Appelgate, Charles Putnam, Peter Appelgate, and Sally Appelgate, Charles Drain, and John C. Drain are illegal and a fraud under the statute of the United States, entitled 'An act to provide internal revenue to support the Government and to pay the interest on the public debt,' approved 30th day of June, 1864, and the amendments thereunto. That an inadequate consideration was expressed in each of said deeds by the grantors and grantees *with the intent of evading the provisions of said statute;* that the grantors and grantees well knew the land conveyed by each deed was at the date thereof worth in cash more than $1,000, and each of them having a revenue stamp on them of 50 cents and no more, not one-half the amount required by said act of Congress, and the recording of each of them

was in violation of the spirit and meaning of sections 152, 156, 158 of said statute; that none of said stamps have been canceled by writing the date when the deed was so used or stamps affixed on the same, and none of them have the initials of the persons using them or affixing the stamps prior to the placing of said deed on the records of Douglas County in the State of Oregon."

To these averments of defendant, Daniel W. Applegate, the plaintiff in this case, in his answer in the Federal court (Record, 37), said:

"And as to the matters alleged in the seventeenth paragraph of said bill against this defendant, denies that his said deeds, or either of them, are illegal or fraudulent or a fraud under the statutes of the United States or any statute relating to internal revenue, and denies that the consideration was expressed in either of the said deeds, either by this defendant or the grantees with intent of evading the provisions of said statute or any statute.

"Denies that this defendant knew at the date of said deeds, or either of them, that the lands conveyed by each of said deeds were worth in cash more than $1,000.

"*Admits that each of his said deeds had only a stamp of fifty cents;* but alleges that said stamps were put on each of said deeds in good faith and without any intent to evade the requirements of provisions of the statute of the United States.

"Denies that the recording of said deeds was in violation of the spirit or meaning of sections 152, 156, 158 of said statute.

"Denies that said stamps have not been cancelled by writing the dates when the deeds were so used, as stamps affixed on the same, or the initials of the persons using them prior to placing them on record, but alleges that the said stamp on each of said deeds at the time the same was executed and the stamps affixed thereto, had the date thereof plainly written thereon, and also the names of Jesse Appelgate and Cynthia Ann Appelgate written across the said stamp, as required by said act of Congress."

Point XI.

THIS IS A CASE "ARISING UNDER THE LAWS OF THE UNITED STATES."

Chief Justice Marshall in Osborn *v.* The United States Bank, 9 Wheat., 887, said:

"Efforts have been made to fix the precise sense of the Constitution when it vests jurisdiction in the Government in 'cases arising under the laws of the Congress.' To me the question appears susceptible of a very simple solution; that all depends upon the identity of the case supposed, according to which idea a case may be such in its very existence, or it may become such as it progresses." And further, in the same case he said, inferentially, "that it would be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction." The same learned jurist having previously, in the case of Cohens *v.* Virginia (6 Wheat.), in discussing the question, said: "A case may truly be said to arise under the Constitution or a law of the United States *whenever its correct decision depends on the construction of either.*"

Mr. Hare, in his work on American Constitutional Law, vol. 2, p. 996, in discussing what under the Constitution constitutes a case arising at law or in equity under its provisions or the acts of Congress, says:

"The case need not arise *exclusively* under the Federal laws or Constitution; it is enough that they confer or enter into any right which is or might be controverted on either side (citing The Mayor *v.* Cooper, 6 Wall., 247; Tennessee *v.* Davis, 100 U. S., 257–270; Ames *v.* Kansas, 111 U. S., 449; Provident Savings Life Ins. Co. *v.* Ford, 114 U. S., 635–641). As was said in The Mayor *v.* Cooper, 'it is not an objection that questions are involved which are not of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient.'"

In the case of The Mayor *v.* Cooper, 6 Wall., 274, this court said:

"Nor is it any objection that questions are involved which are not of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction. A case in law or equity consists of the right of one party as well as the other, and may be truly said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the right construction of either. The rule applies with equal force where the plaintiff claims a right and where the defendant claims protection by virtue of one or the other."

The act of March 3, 1875 (18 Stat., 475), in reference to the removal of causes, is a plenary exercise on the part of Congress of the constitutional grant, and the same principle governs in determining what constitutes jurisdiction under that act, as in determining what is a case arising under the Constitution. This is clear from the opinion of this court in the case of Gold Washing and Water Co. *v.* Keyes (96 U. S., 199). There this court very properly said:

"The suit must, in part, at least, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved;" and again, the pleadings must show "that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction *or effect* of the Constitution, or some law or treaty of the United States."

In this case the pleadings in the Federal Court clearly presented just such a controversy, and required for a determination of Dowell's rights a construction as to the *meaning* and also as to the *effect* of the Internal Revenue Acts in question.

This court in Tennessee *v.* Davis, 100 U. S., 258, opinion by the late Justice Strong, said:

"A case arises under the Constitution not merely when a party comes into court to demand something conferred upon him by the Constitution, a law of the United States, or a treaty, but whenever its correct decision as to the right, privileges, claim, protection, or defense of a party, in whole or in part, depends upon the construction of either. It is in the power of Congress to give the Circuit Court of the United States jurisdiction of such a case, although it may involve other questions of fact or of law."

Discussing the question further, Mr. Hare, pp. 996, 997, vol. 2, says:

"The right to sue in the Circuit Court for the infringement of a patent rested on the same principle. Such a case depended on the constitutional provision securing an exclusive right to inventors and the statutes passed to carry them into effect. Yet the defendant might not question the validity of the patent or make any point involving the construction of the patent laws, but might confine himself to an allegation that he had not used the plaintiff's invention. This plea would then be the sole matter in controversy, but the cause would not on that account cease to be under the Constitution and laws of the United States."

Hare on American Constitutional Law, vol. 2, 993.

What is a case arising under the Constitution and laws?

See Hare on Constitutional Law, pp. 993, 996, and 997;

Osborn *v.* The Bank of the United States, 9 Wheat., 738;

The Mayor *v.* Cooper, 6 Wall., 247;

Tennessee *v.* Davis, 100 U. S., 257, 270;

Ames *v.* Kansas, 111 U. S., 449;

Starin *v.* New York, 115 U. S., 248, 257;

Provident Savings Life Ins. Co. *v.* Ford, 114 U. S., 635.

By section 1 of the act of March 3, 1875 (18 Stats., 470), jurisdiction is conferred on the United States Circuit

Courts of a suit in equity arising under a law of the United States.

The suit in question here was, presumably, removed from the Oregon State court to the Circuit Court of the United States for the District of Oregon under the act of March 3, 1875, *supra*.

But, while this is so, there is nothing whatever in this Record to show at whose instance it was removed; whether on motion of Dowell, the plaintiff, or one or all of the defendants; nothing to show the date of removal or the grounds on which removed. The only thing in this Record, from beginning to end, to indicate in the slightest degree that the case was ever in the State Court, or was ever removed therefrom to the Federal Court, is the following averment in Dowell's supplemental bill filed in the Federal Circuit Court September 12, 1881 (Record, 32–34):

"And thereupon your orator complains that on the 11th day of October, 1879, he commenced this suit in the Circuit Court of the State of Oregon, for the county of Douglas, and afterwards this suit was removed into this court."

Inasmuch, therefore, as the Record fails to disclose when, or on whose motion, or on what grounds the case was removed, and as the court entertained jurisdiction, and as there is nothing in the Record to negative jurisdiction, this court will, in this collateral proceeding, presume it was properly and on sufficient grounds reviewed, and that jurisdiction attached.

It is true, if we travel outside the Record in this case and consider the report of the case, we find—

In *Dowell* v. *Appelgate* (7 Sawyer, 233), the court, Deady, judge, says:

"This case was commenced in the State Circuit Court for Douglas county on October 11, 1879, and after sundry

proceedings therein, was removed to this court by the plaintiff on December 23, 1880, on the ground that its determination involved the construction of certain provisions of the Internal Revenue act of June 30, 1864 (13 Statutes, 223), and the amendments thereto. Here the plaintiff has restated his case in the form of a bill in chancery called 'the amended bill,' which was filed April 6, 1881."

It is perfectly apparent, therefore, that the adjudication of Dowell's rights in the case removed from the State to the Federal court necessarily required a construction as to the *meaning* and *effect* of the internal revenue acts of Congress hereinbefore quoted. It is also a fact that prior to the date of the removal to the Federal court different courts had placed different constructions upon these acts. For instance, the Supreme Court of the State of Nevada, in January, 1866 (vols. 1 and 2, Nev. Reps., p. 541), had placed one construction upon the law as to *what effect* the omission to place proper stamps was to have on the *validity* of the instrument, accompanying the decision by the following statement in the opinion:

"The question as to what was the *effect* of omitting the proper stamps when the notes were executed is one far more difficult to determine. The statute itself is by no means clear, and we have not been referred to any English decisions which we think are applicable to the case before us."

And further—

"Taking the section as it is amended by the act of March, 1865, and it seems clear that Congress intended that all instruments requiring stamps should be held invalid when the stamps were omitted with intent to evade the law, but that in all cases where there was such an omission it should be held and presumed that it was with intent to evade the law."

It is true Judges Sawyer and Deady (7 Saw., 232), in the case of Dowell *v.* Appelgate and others, while they entertained jurisdiction of the case on the ground that the construction of this internal revenue act and its amendments were necessarily involved in the case, and the determination of Dowell's rights in the controversy depended in part at least on the *construction* and *effect* of these acts, placed a different construction on the act and amendments from that placed by the Nevada court. These references are sufficient, as it seems to us, to make it perfectly apparent that the case was one arising under the laws of Congress within the meaning of the provisions of the act of March 3, 1875, under which the case was removed. This being so, it is not necessary that we discuss here as to what the proper construction of these laws is. The court acquired jurisdiction because their construction was involved. It is quite immaterial whether the court placed one construction or another on the acts when they made their decision.

But again the pleadings and decree in the case of the Federal Circuit Court (Record, 27–35–40) show clearly that Dowell's rights in part at least in that case, and a correct decision as to these, depended upon a proper construction of the act of Congress approved September 27, 1850, commonly known as the Oregon Donation Act. (9 Stats. U. S., 497.)

At common law the husband was entitled to the usufruct of all real estate owned by the wife at the time of marriage, or which she might acquire during coverture. He was entitled to the rents and profits during coverture. His estate was, therefore, a freehold.

Schouler on Husband and Wife, sec. 167;
2 Kent's Com., sec. 131; Coke Litt., 351 *a*;
West *v.* West, 3d Randolph, 373; 5 Vesey, 517.

Furthermore, at common law the husband's interest in his wife's real estate is liable for his debts, and may be taken on execution against him.

Schouler on Husband and Wife, sec. 168;
2 Kent, sec. 131;
Babb *v.* Perley, 1 Me., 6;
Litchfield *v.* Cadworth, 15 Peck., 23;
1st Tucker's Com., 110;
Matlock *v.* Stearns, 9 Vt., 326.

In Pennsylvania it has been held that where a husband has conveyed his interest in his wife's lands—that is, his right to the rents and profits during coverture—in fraud of his creditors, they may levy on the growing crops.

Schouler on Husband and Wife, sec. 168;
Stehman *v.* Huber, 21 Penna. State, 262.

Dowell, in his bill in the Federal Circuit Court, which was for the purpose of conforming to the Federal practice, made the averment—

"That Jesse Appelgate, at the time of committing the grievances hereinafter mentioned" (meaning the several fraudulent transfers to his children), "was the owner in fee simple of the north half of said Donation Land Claim, and he *had a life estate in the south half of said Donation Land Claim which was set apart to his wife, Cynthia Ann Appelgate.*" (Record, 27.)

And further, "that the said Jesse Appelgate and his wife, Cynthia Ann Appelgate, with intent to delay, cheat, and defraud the State of Oregon and your orator out of said debt, deeded all of said tracts of land to their children, as follows (Record 27):

And in his supplemental bill filed September 12, 1881, Dowell made the averment that "on the — day of June, A. D. 1881, since the commencement of this suit, said

Cynthia Ann Appelgate died intestate at Yoncalla, Douglas County, Oregon," leaving children, etc. (Record, 33). The death of the wife occurred, therefore, subsequent to the removal of the cause to the Federal Circuit Court, and subsequent to the filing of Dowell's bill of complaint in that court. (Record, 32, 33, 34.)

The answer of Daniel W. Appelgate was filed in the Federal Circuit Court May 2, 1881 (Record, 38), which was prior to the death of the wife of Jesse Appelgate. (Record, 33.)

In this answer Daniel W. Appelgate took issue with the foregoing averments in Dowell's bill, as follows:

> " Denies that at the time of the alleged grievances in said bill mentioned, or at any other time, the defendant, Jesse Appelgate, *had a life estate, or any estate whatever, in the south half* of the Donation Land Claim in said paragraph described as Jesse Appelgate's Donation Land Claim, etc."

It is in the absence of anything of a negative character to be presumed that the issues raised by these pleadings are identical with those raised by the pleadings in the State Court and before the cause was removed to the Federal Court. This being so, a Federal question was raised, presumably before the case was removed to the Federal Court and *certainly* after it reached that court, within the meaning of the Constitution, the provisions of the Judiciary Act of 1789, and the act of March 3, 1875. That question is simply this: What effect, if any, do the provisions of the Donation Act of 1850 have upon the rights of the husband in the wife's part of a Donation Claim? Do its provisions abrogate the rule of the common law as above indicated?

In other words, the right of Dowell to an interest in the wife's half of the Donation Claim depended on the *construction* and *effect* to be given by the court to the

4th section of that act. There was a "real and substantial controversy" between the parties, calling for the construction of an act of Congress, in order to a correct determination of the rights of the parties; hence it was a "case arising under an act of Congress" within the meaning of the Constitution and the act of 1875, relating to the removal of causes.

Furthermore, the supplemental bill (Record, 33) raised the further Federal question as to what interest the husband had in his wife's half of the Donation Claim *after* his wife's death. That is, was the estate by curtesy, as provided by the statute of the State, cut off by the peculiar provisions of the Donation Act?

The Federal court held not (see decree, Record, 40), and held further—

"That on and prior to April 20, 1869, said Jesse Appelgate was seized and possessed of an estate for his own life in the south half of said Donation Claim" (Record, 40).

And the above life interest was sold under said decree and purchased by Dowell.

The Oregon Donation Act, 27th September, 1850, Section 4, is found Vol. 9, U. S. Statutes, 497.

Conclusion.

As stated by the court in the case of Crescent Live Stock Company *v.* Butchers' Union, 120 U. S., 157, in characterizing the character and dignity of a Circuit Court of the United States as compared with the Supreme Court of a State—

"The Circuit Court is a court co-ordinate to the Supreme Court of Louisiana" [Oregon] "in authority, and equal in dignity, being the highest Federal court sitting in that State, whose judgments and decrees are final and

conclusive, subject only to review and reversal in the Supreme Court of the United States. * * * The record of its proceedings imports verity; its judgments can not be impugned, except by direct process from superior authority. The integrity and value of the judicial system as an institution for the administration of public and private justice rests largely upon this wholesome purpose."

We respectfully insist, in conclusion, in the language of this court in the case just cited:

"That principle has been disregarded in the present case by the Supreme Court 'of the State of Oregon,' and a reversal of its decree should follow."

Respectfully submitted,

B. F. DOWELL,
JOHN H. MITCHELL,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 209.

B. F. DOWELL, PLAINTIFF IN ERROR,

vs.

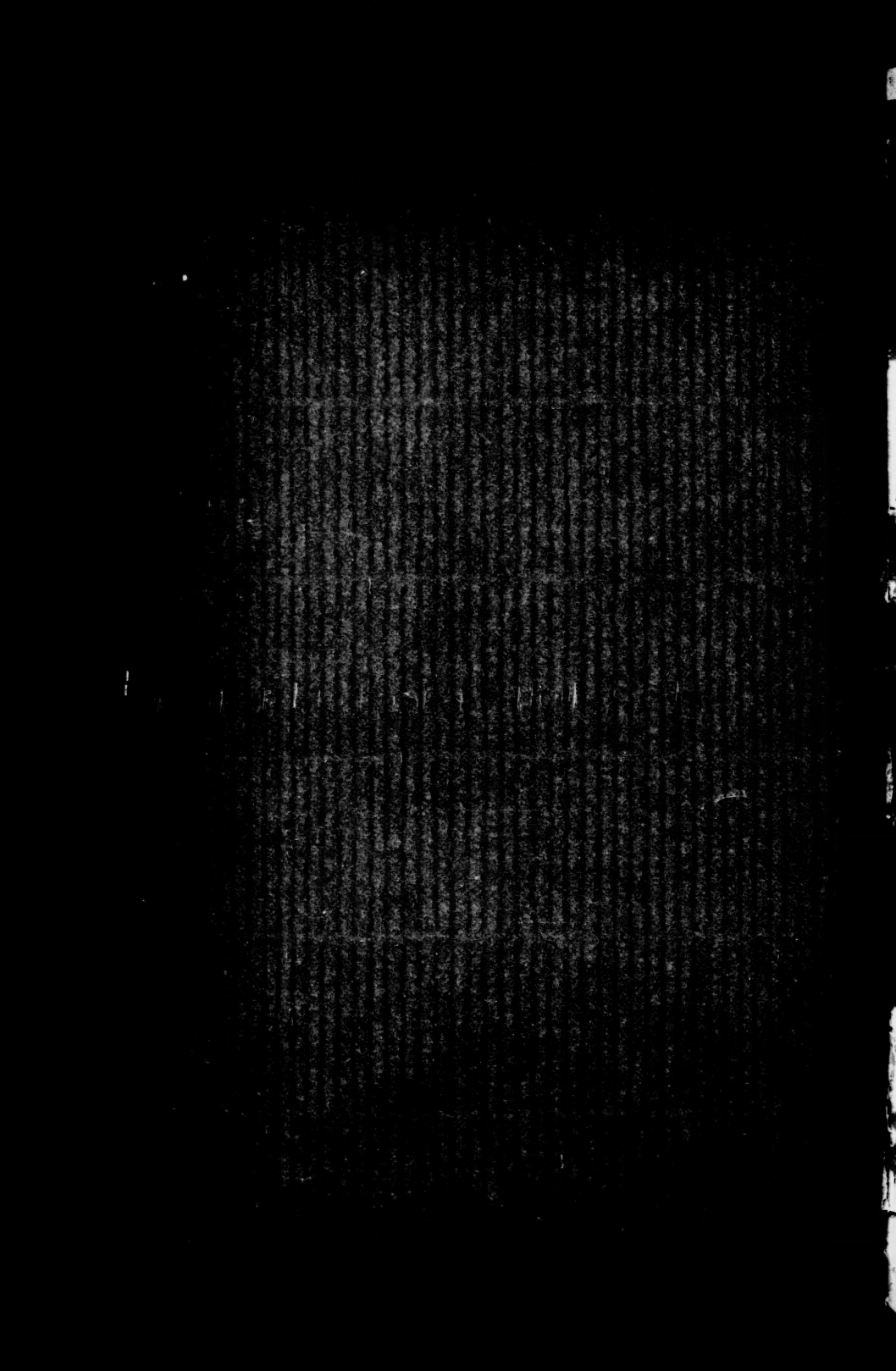
D. W. APPLEGATE, DEFENDANT IN ERROR.

Writ of Error to the Supreme Court of the State of Oregon.

Brief for Defendant in Error.

J. N. DOLPH,
Attorney for Defendant in Error.

W. H. MOORE & Co., Printers, 511 Eleventh Street N. W.



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Brief for Defendant in Error.

STATEMENT OF THE CASE.

This suit was brought in the Circuit Court of the State of Oregon for Douglas County by the defendant in error who was in possession of the premises to remove a cloud from his title to 40 acres of land, a part of the Donation Land claim of Jesse Applegate and wife situated in said county. (Record, folios 2 and 3.) The suit was brought under §504 of the Oregon Code, which is as follows:

"§504. Any person in possession by himself or tenant of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest."

The complaint contains the usual allegations of possession, and of ownership of the premises in fee simple, and it is alleged that a certain conveyance to the defendant Dowell, executed by William B. Gilbert, a master in chancery of the Circuit Court of the United States for the district of Oregon, executed December 6, 1883, in pursuance of a decree of said circuit court, made the 5th of January, 1883, in a cause wherein B. F. Dowell was complainant, and Jesse Applegate and others were defendants, is a cloud on plaintiff's title. (Folio 2.)

The plaintiff in error, the defendant in the court below, denied plaintiff's ownership and alleged ownership in himself under a decree rendered in his favor and against Jesse Applegate, the defendant in error and others, by the United States Circuit Court for the district of Oregon, on or about January fifth, 1883, and a deed executed to him in pursuance of a sale under such decree by a master in chancery of said court, alleging that the 40 acres in controversy was found in said suit by said United States Court to belong to said Jesse Applegate and to be subject to the payment of certain judgments in favor of the respondent and against said Jesse Applegate. (Record, folios 15 to 20, inclusive.)

By the reply the allegation that the title of the 40 acre tract in controversy, or to any part of it, was in issue or determined in the suit in the Circuit Court of the United States was denied and the jurisdiction of the court in said suit was put in issue. (Record, folios 34 and 35.)

Upon the trial in the State court the plaintiff introduced a duly executed deed for the 40 acre tract in controversy from W. H. H. Applegate and wife to himself, dated October 8, 1874 and duly recorded in the record of deeds of Douglas County, Oregon, the county in which the land

was situated October 31, 1874, and it was conceded by the defendant and found as a fact by the court upon the trial that prior to the execution of said deed, to-wit, on April 19, 1869, said Jesse Applegate and wife, who were the donation claimants of said land, had conveyed said tract to said William H. H. Applegate by conveyance recorded May 4, 1869. (Record, folio 63.) The plaintiff's possession was not denied in defendant's answer, and in open court defendant *waived all issues as to the consideration of the deed from W. H. H. Applegate to the defendant in error.* (Record, folio 38.)

The defendant to maintain his case in the State Circuit Court introduced in evidence certified copies of an amended and supplementary bill filed in the Circuit Court of the United States for the district of Oregon in a suit transferred to that court from the State Circuit Court, in which the defendant, the plaintiff in error herein, was complainant, and said Jesse Applegate, William H. H. Applegate, and the defendant in error herein, and others were defendants, a certified copy of the answer filed in said suit by the defendant in error, also certified copies of the decree therein and of the deed executed to the plaintiff in error herein by a master in chancery, in pursuance of a sale of the property under said decree. The master's deed bore date December 6, 1883. (Record, folio 42.)

The Oregon Circuit Court held the decree of the United States Circuit Court to be a bar to plaintiff's cause of suit, dismissed the complaint and rendered judgment for costs in favor of the defendant. (Record, folio 42.)

The cause was appealed to the Supreme Court of the State which reversed the decree of the lower court, holding that the plaintiff's title to the land in controversy was not in issue in the suit in the Circuit Court of the

United States and that the decree of said court was not a bar to plaintiff's cause of suit. The cause was remanded for a new trial. (See Record, folio 62.) The court below on a second trial applied the law to the cause as laid down by the Supreme Court and rendered a decree for the plaintiff May 14, 1888 from which decree the defendant appealed to the Supreme Court of the State. That court affirmed the decree holding that the decision of the court upon the first appeal became the law of the case on the second appeal. (See Applegate *vs.* Dowell, 17 Or., 299.)

From the judgment and decree of the Supreme Court the cause is brought to this court by writ of error.

In the findings of the State Circuit Court upon the second trial the amended and supplemental complaint, answer of the defendant, Daniel W. Applegate, (the defendant in error in this court.) the decree and proceeding under the decree in the Circuit Court of the United States are set out at length and appear in the record from folio 62 to folio 92, inclusive.

The plaintiff in the State Circuit Court, the defendant in error herein, upon showing his possession of the land in controversy and proving title dereigned from Jesse Applegate, the original patentee of the land, made out his case. It then became necessary for the defendant, in order to defeat the plaintiff's cause of suit, to prove that the plaintiff had acquired no title by his conveyance from William H. H. Applegate or had been divested of it in some legal manner. The defendant undertook to show that the plaintiff had been divested of title by introducing the amended and supplementary complaint, the answer of the defendant in error, the decree of the Circuit Court of the United States in the suit before referred to and the deed executed to him by the master in chancery

upon a sale under the decree. Whether such evidence was sufficient to show that the plaintiff had been legally divested of title to the lands in controversy was the only controverted matter and depends upon two questions:

First. WHETHER THE UNITED STATES COURT HAD JURISDICTION OF THE SUIT IN WHICH SAID DECREE WAS RENDERED; and

Second. WHETHER THE SAID DECREE OPERATED UPON OR AFFECTED PLAINTIFF'S TITLE DERIVED UNDER THE DEED FROM WILLIAM H. H. APPLEGATE.

As to the first question the record shows that all the parties to the suit were citizens of Oregon; that the subject-matter of the suit was land situated in said State; that the object of the suit was to enforce the payment of judgments rendered in the State courts of Oregon, a matter of purely local concern.

An attempt was made to give the United States Court jurisdiction of the cause by the allegations of the bill concerning the affixing and cancellation of revenue stamps upon the deeds it was sought to have declared fraudulent. This attempt will be considered later. The effect of the decree of the Circuit Court of the United States, if it shall appear that it had jurisdiction of the cause, must be determined from the allegations of the amended and supplemental bill and the answer of the defendant, D. W. Applegate.

The allegations of the bill, so far as necessary to the consideration of the questions involved, are in substance that Dowell, the plaintiff in error, and Jesse Applegate became co-sureties to the State of Oregon in 1862 and also in 1866 upon the official bonds of Samuel E. May as Secretary of State; that May became a defaulter, and judgments were recovered against the sureties in 1874; that

one of said judgments was for $8,929.85, besides costs and disbursements; that a transcript thereof was filed and the judgment docketed in the office of the county clerk of the County of Douglas, in the State of Oregon, on the eleventh day of August, 1874; that prior to the twenty-seventh day of June, 1878, Dowell paid on the said judgment, $10,837 78, and on said day recovered a judgment against said Jesse Applegate, his co-security, on account of said payment, for the sum of $4,882.19, which was on the same day entered upon the judgment lien docket of said County of Douglas; that Dowell on the 16th of November, 1878, paid the balance of said judgment, amounting to $1,385.61, and gave due notice that he claimed the benefit of such payment against Applegate and became subrogated to the rights of the State in reference thereto.

That the amount of Dowell's claim against Jesse Applegate on the 1st of January, 1881, was $6,584.09.

That said Jesse Applegate took a donation claim, situated in Douglas County, Oregon, comprising 640 acres, under the Donation Law of September 27, 1850, and perfected title thereto, the north half to himself and the south half to his wife, Cynthia Ann Applegate, and acquired other lands in said Douglas County described in said bill.

That said Jesse Applegate and wife, with intent to delay, cheat, and defraud the State of Oregon and Dowell out of said debt, deeded all of said lands to their children as follows: To their son, William H. H. Applegate, 160 acres of the north half of said donation claim by deed dated the 6th day of April, 1867, for the apparent consideration of $500; also 80 acres of said donation land claim by deed dated the 19th day of April, 1869, for the apparent consideration of one dollar, the first of which

deeds was recorded in the office of the clerk of said county February 6, 1869, and the second May 4, 1869; to their son, D. W. Applegate, the defendant in error, 160 acres of said donation claim by deed dated April 6, 1867, for the apparent consideration of $500, which deed was recorded February 6, 1869; also 80 acres of said donation claim for the apparent consideration of one dollar, which deed was recorded May 5, 1869; to Charles Putnam, a grandson of said Jesse Applegate, and wife, a tract of land outside of said donation claim; to Peter Applegate, their son, 211.31 acres, 170 acres of which was a part of said donation claim; to Sallie Applegate, a tract of land not a part of said donation claim. That said deeds were illegally recorded; that each and all the grantees received them with the intent before mentioned; that each and all of them had notice that said Jesse Applegate was largely indebted to the State of Oregon as the security of May at the time each deed was made and delivered and well knew that said conveyances would make the grantor, Jesse Applegate, insolvent; that the deeds to William H. H. Applegate in 1867 were antedated to deceive and cheat, etc.;

"And that said deeds were each and all of them made without any valuable consideration whatever; that neither of the said grantees paid the said Jesse Applegate or his wife, a cent of money for the lands described in said deeds; that the money consideration expressed in each of said deeds is false and fictitious, and each and all of them were made and delivered with the intent of deceiving, cheating, delaying, and defrauding the creditors of Jesse Applegate, including your orator;"

That executions have been issued on said judgments against Jesse Applegate and returned unsatisfied.

Concerning the alleged insufficiency of the revenue stamps and the failure to cancel them, the allegations are as follows:

"XVII. And he is advised by his counsel and believes that each and all of said deeds to Wm. H. H. Applegate, Daniel W. Applegate, Charles Putnam, Peter Applegate, and Sallie Applegate, Charles Drain and John C. Drain are illegal and a fraud under the statute of the United States entitled 'An act to provide internal revenue to support the Government and to pay interest on the public debt,' approved 30th day of June, 1864, and the amendments thereunto, that an inadequate consideration was expressed in each of said deeds by the grantors and *grantors* with the intent of evading the provisions of said statute.

"That the grantors and grantees well knew the land conveyed by each deed was at the date thereof worth in cash more than $1,000, and each of them have a revenue stamp on them of 50 cents and no more, not one-half the amount required by said act of Congress, and the recording of each of them was in violation of the spirit-meaning of sections 152, 156, 158 of said statute; that none of said stamps have been cancelled by writing the date when the deed was so used or stamps affixed on the same, and none of them have the initials of the person using them or affixing the same prior to the placing said deed on the records of Douglas County, in the State of Oregon."

By the separate answer of the defendant, D. W. Applegate (the defendant in error in this suit), he denied among other things the fraudulent intent charged in the bill against Jesse Applegate and wife in making the deeds referred to, and in conveying to him the 160 acres of land by deed of April 6, 1867, denied that said deed conveyed or purported to convey any part of Jesse Applegate's half of said donation claim, or that the consideration therein named was an apparent consideration, but alleged

that the whole of said land conveyed by both of the deeds from Jesse Applegate and wife to him was within the southeast part of the wife's half, except a small piece, which lay south of said claim; and that said deeds were made and delivered to him for a good, valuable and sufficient consideration set forth in the answer; denied all the fraud charged against him in said bill relating to his receiving and recording the deeds executed to him and their alleged effect upon the solvency of Jesse Applegate, and denied that Jesse Applegate was insolvent in consequence of making said deeds.

By the decree in said suit in the U. S. Circuit Court it was adjudged that the conveyance of 121.55 acres of the north half of said donation land claim by Jesse Applegate to his son, William H. H. Applegate, by deed dated April 19, was voluntary and in fraud of the rights of Dowell, and it was therefore against him and his assigns declared to be null and void; that the several conveyances to Peter Applegate and Sallie Applegate were also void for the same reason and to the same extent. It was further decreed that the conveyance to William H. H. Applegate of 160 acres and to Daniel W. Applegate of 146 acres by deeds dated April 6, 1867, were made in good faith. The 40 acre tract in controversy is a part of the 81.55 acres (alleged in the bill in the U. S. court to have been 80 acres) of the north half of the Jesse Applegate donation claim, conveyed to William H. H. Applegate by deed of April 19, 1869, before the commencement of said suit in the United States Circuit Court, and on the eighth of October, 1874, had been conveyed by said William H. H. Applegate and wife to the defendant in error, D. W. Applegate, and said conveyance had been duly recorded October 31, 1874. The suit, afterwards transferred

to the United States Circuit Court, was commenced April 6, 1881. There was no allegation in the bill in said suit concerning the said conveyance from William H. H. Applegate to D. W. Applegate.

From these references to bill, answer, and decree in the suit in the Circuit Court of the United States it will be seen that the question whether the decree of that court divested the defendant in error of his title acquired under his deed from Wm. H. H. Applegate must be determined by the question whether the fact that he was made defendant in the suit was sufficient without any allegations or proofs concerning the conveyance of the 40 acres of land in controversy made prior to the commencement of said suit by William H. H. Applegate to him was sufficient to divest him of his title; in other words, whether, having been made a defendant in a suit in which the conveyance of the land in question to him, although on record, was not alleged or attacked; the complainant only tracing the title from Jesse Applegate to William H. H. Applegate, and attacking the supposed title of the latter, it was necessary for defendant in error to avoid being estopped from afterwards asserting his title to the land under said deed, to set up in his answer the conveyance to him and allege that he was a *bona fide* purchaser for a valuable consideration, and be adjudged to be the owner of the lands. He was made defendant for the purpose of having the validity of other conveyances to him determined, but was in no manner connected by the pleading or proofs with the 40 acre tract now in controversy. He defended successfully as to property and transactions with which the allegations of the bill connected him, at least in part.

I.

The Circuit Court of the United States did not have jurisdiction of the cause.

The suit was commenced in the State Circuit Court for Douglas County, October 11, 1879, and afterwards transferred to the U. S. Circuit Court on the ground that the determination involved the construction of certain provisions of the Internal Revenue Act of June 30, 1864, and the amendments thereto.

In Gold Washing and Water Co. *vs.* Keyes, (96 U. S. 199) this court held that—

"A suit cannot be so removed, under the second section of the act of March 3, 1875, (18 Stat., 475) simply because in its progress, a construction of the Constitution or a law of the United States may become necessary, unless it, in part at least, arises out of a controversy in regard to the operation and effect of some provision in that Constitution or law upon the facts involved."

Mr. Chief Justice Waite, delivering the opinion of the court said:

"A cause cannot be removed from a State Court simply because in the progress of litigation it may be necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must in part at least, *arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.*"

* * * * * * * *

"Before, therefore, the Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record by a statement of facts 'in legal and logical form,' such as is required in good pleading (1 Chil. Pl. 213), that the suit is one which 'really

and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States."

See Tennessee *vs.* Davis. 100 U. S. 257; Starin *vs.* New York, 115 U. S. 257.

In this last case, and cases cited, it was held that if from the questions involved in a suit—

"It appears that some title, right, privilege, or immunity, *on which the recovery depends*, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States within the meaning of the term as used in the act of 1875; otherwise not."

In Dowell *vs.* Griswold, in the Circuit Court for the District of Oregon (5 Sawyer 39), it was held that the Circuit Courts of the United States have "not jurisdiction of a case irrespective of the citizenship of the parties, unless it arises out of a law of the United States; nor is an averment that the action arises out of such law sufficient to confer jurisdiction, but it must appear from the facts stated that it does so arise."

The allegations of the bill concerning the affixing and cancellation of revenue stamps upon the conveyances alleged to have been fraudulent as against Dowell, the complainant in said suit, do not show that the cause of suit arose out of a controversy between the parties in regard to the effect of a law of the United States. This question is so fully presented in the opinion of Judge Thayer, from which I quote hereafter, that I do not care to discuss it. But if it be admitted that Dowell's right of suit in some way depended upon the question as to

whether the conveyances attacked were duly stamped still the allegations of the bill were not sufficient.

It is alleged that the real consideration of the deed to Charles and John Drain was $2,000 but that the consideration named in the deed to them was $500, but there is no allegation that the deed was inadequately stamped with intent to evade the stamp act.

When the suit had been transferred to the United States Court the Drains demurred to the bill and the bill was dismissed as to them, the court holding that the allegations as to affixing and cancellation of stamps upon the deed to them were insufficient in law to show that the deed was invalid.

The court held (Dowell *vs.* Applegate *et al.*, 7 Sawyer, 232) that—

"An allegation that a conveyance was made and stamped for less than the actual consideration, with intent to aid or give color to a former fraudulent conveyance of the same premises to the grantor, or that said conveyances made and stamped for an 'inadequate' consideration, does not show that such conveyance was not duly stamped with intent to evade the stamp act."

The defendants, Charles and John C. Drain, dropped out of the case, and the jurisdiction of the court depended upon the allegations made in the bill concerning the stamping of the deeds to the other defendants.

As to the amount of the stamps upon the other deeds the complainant, by alleging that the conveyances were without consideration, showed affirmatively that the stamps were sufficient, as it was the amount of the consideration and not the value of the land that determined the amount of the stamps.

The provision of the statute requiring deeds to be stamped was as follows:

"*Conveyance.*—Deed, instrument, or writing whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conferred to, or vested in the purchaser or purchasers, or any other person or persons, by his, or their direction, when the consideration or value does not exceed five hundred dollars, fifty cents."

In United States *vs.* Isham, (17 Wall., 504,) this court laid down the following rule for the construction of this statute:

"4th, If there is doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B.; in Girr *vs.* Scudds, 11 Exchequer, 191, 'a tax cannot be imposed without clear and express words for that purpose."

See Bumps' Internal Revenue Laws, pages 344 and 345.

In the rules and regulations concerning the purchase and use of internal revenue stamps, issued by the Department May 1, 1869, published in the Internal Revenue Record for May 22, 1869, I find the following:

"It is only upon conveyances of realty *sold* that stamps are necessary. A deed of real estate, made without valuable consideration, need not be stamped as a conveyance but should be stamped as an agreement or contract. When a person conveys real property, *without valuable consideration*, through the intervention of a trustee, neither the deed to the trustee, nor the trustee's deed to the *cestui que* trust need be stamped as a conveyance of 'realty sold,' but each should be stamped as a contract or agreement. When a deed, purporting to be a conveyance of realty sold and stamped accordingly, is inoperative and dead, the confirmation made simply to cure the defect requires no stamp. * * * *

Partition deeds between tenants in common need not be stamped as conveyances, inasmuch as there is no sale of the realty, but simply a marking out or defining of the boundaries of the part belonging to each, but should be stamped as agreements."

(See also 5th Internal Record, 60.)

In Sime *et al vs.* Howard *et al.* (4 Nev., 473) it was held:

"A sealed instrument which merely declares and acknowledges that a party holds a lot of ground merely in trust is not a conveyance, and need not be stamped."

In James *vs.* Blauvelt and Fredericks, in the Circuit Court of the United States for the Eastern District of Pennsylvania (26 Law Reporter, 485), Mr. Judge Cadwalader held, where property had been conveyed to a middleman to be conveyed to another, that—

"The conveyance from the middleman required no stamp, the consideration or value not exceeding one hundred dollars, and that the conveyance to the middleman should have been stamped upon the consideration."

And in delivering the opinion, holding that it was the consideration of the conveyance and not the value of the land that was to be stamped, he said:

"If the word *value* in the act of Congress could be understood as meaning value of the consideration the assessment might be made upon the beneficial return alone; but the words *consideration* or *value*, as used in the act, have no such import. Their application cannot be such that the word *value* qualifies the word *consideration*. The *consideration* is to be understood as that of the *conveyance;* the *value* as that of the *subject* of the conveyance. The question depends, therefore, upon the unqualified import of the phrase *consideration of the conveyance;*"

And holding in that case that the stamps had not been affixed, as required by the consideration, allowed the complainant to affix additional stamps to make his title unexceptionable.

Under these authorities *it is apparent from the allegations of the bill that the stamps upon the deeds were sufficient.*

As to the allegation concerning the cancellation of the stamps it is sufficient to say *that it is not alleged that they were left uncancelled "with intent to evade the stamp act,"* and no intent is alleged in connection therewith. There would be no motive to omit the proper cancellation of the stamps.

Section 158 of the act of Congress imposing stamp duties, as amended by act of 1866 (14 Stat. at Large, 142), provides for the stamping of an instrument by payment of a penalty, and for the remission of the penalty in certain cases. Can it be that the United States Circuit Court acquired jurisdiction of a cause of which it was liable to be ousted of jurisdiction at any time by the defendants applying to the Collector of Internal Revenue and having stamps affixed to the conveyances in controversy?

Judge Thayer, of the Supreme Court of Oregon, delivering the opinion of the court upon the hearing of this cause in that court (Applegate *vs.* Dowell, 15 Or. 503), said:

"The allegation in reference to affixing the revenue stamps upon the deeds, their inadequacy, and the neglect to cancel them before the recording of the deeds, were evidently made in order to give the United States courts jurisdiction of the suit. The bill, in fact, shows upon its face that said court would have had no jurisdiction of it in the absence of such allegations, as it contains in the outset an express statement that all the parties to the suit were citizens of the State of Oregon."

* * * * *

"The view we have taken of the first one of the questions before mentioned renders it unnecessary to consider the second. But the matter is of too much public interest, I think, to be passed over without observation. Parties to litigation in this State have often been desirous of having it adjudicated in the Federal courts. A preference in favor of those tribunals, on account of the learning and ability of the judges who preside over them, is very proper. It must, however, be borne in mind that the jurisdiction of the United States courts in equity and common law cases is limited, although they are not inferior courts; that it is necessary to show, in the outset, when a case of that character is sought to be commenced therein, some especial grounds of jurisdiction over it before they are authorized to assume the right to decide the matter submitted, and that the facts set out as the ground of jurisdiction will be presumed to be the only source from which it is derived. When, therefore, the facts upon which it is claimed are not sufficient to confer jurisdiction, it cannot attach; nor will it matter if the parties, as they often do, consent to the court's exercising it under such circumstances. Consent will not confer jurisdiction over the subject-matter in any case. The law must give it; otherwise, it cannot be acquired. Nor will the decision of the court that it has jurisdiction avail, where facts are required to be shown as a condition of its exercise, unless they legally tend to establish a case conferring it. No court can obtain jurisdiction by arbitrarily deciding that it has it. I am induced to make these suggestions for the reason that it is a very unpleasant and extremely delicate duty to be required to pass upon the authority of another court to adjudicate an important matter; and there should never be occasion for it where it can possibly be avoided.

The only grounds, as before observed, upon which it can be claimed that the Circuit Court of the United States for the district of Oregon had jurisdiction of the suit of Dowell *vs.* Applegate, (7 Fed. Rep., 881,) in which the said decree was given, were the allegations in refer-

ence to the insufficiency of the revenue stamps upon the deeds executed by Jesse Applegate and wife to their children, and by William H. H. Applegate to Charles and John C. Drain. The bill filed therein stated expressly that all the parties were citizens of the State of Oregon. The proceeding was to enforce the payment of the judgments recovered in the State courts of the State of Oregon, growing out of a defalcation of one of its State officers. It was a suit to reach property that the plaintiff, in one of the judgments, and who had been subrogated to the rights of the plaintiff in the other, had been unable to reach by the ordinary process of execution issued out of the State court. The jurisdiction of the said United States court was invoked as auxiliary to the process of the State courts; and the Federal question involved in the case, if it deserves to be considered as such, was not regarded of sufficient importance to receive from the court, in the opinion delivered, more than a passing remark, and was evidently thrown into it as a mere subterfuge upon which to claim the benefit of Federal jurisdiction. It is to be seriously regretted that the decree of a court of so high standing, in a suit of such magnitude and importance, that was tried with ability, and decided with great care and painstaking, should hang upon so slender a thread for its authority. The complainant in the suit was anxious, no doubt, to have it tried in the Federal court, and it is more than probable that the defendants therein willingly consented to it. Parties may agree to an arbitration of their differences, but they cannot clothe a court with power to hear and determine a case. The law must invest that authority. The Constitution of the United States delegates to it certain judicial power. It extends to all cases, in law and in equity, arising under the Constitution, the laws of the United States, and treaties made under their authority, to controversies between citizens of different States, and a few other cases, which need not be mentioned. The United States court must have acquired jurisdiction over the suit referred to under the act of Congress adopted to carry out the two provisions of the Constitution above set

out; and the extent of authority of such act must be measured by the power delegated by the said provisions The former may be co-extensive with the latter, but cannot exceed it.

Of course, it will not be claimed that the controversy was between citizens of different States, in view of the the statement referred to in the bill. It must have been a case "arising under the laws of the United States." And how could it be regarded as such a case when the right of Dowell to a recovery in the suit did not depend upon any such law? Judge Deady, in Dowell *vs.* Griswold, (5 Sawy., 43,) very properly observes that "a case does not arise under such a law, within the scope of that jurisdiction, unless the very right of the party springs out of or has its origin in such law." And this is but a reiteration, in effect, of the language of the profound jurist, Chief Justice Marshall, whose decisions long ago established the landmarks in the law of construction of the jurisdiction of the Federal courts under the Constitution of the United States. In Cohen *vs.* Virginia, (6 Wheat., 379,) he said that a case "may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either." And in Osborne *vs.* Bank, (9 Wheat., 882,) he said, inferentially, that it would be a sufficient foundation for jurisdiction "that the title or right set up by the party may be defeated by one construction of the Constitution, or law of the United States, and sustained by the opposite construction.

How Dowell's right to have the deeds referred to set aside, and the land conveyed thereby sold, and the proceeds applied in payment of the two judgments, was affected by any construction of any act of Congress might be explained by metaphysical subtleties, but no ordinary logic can demonstrate it. What difference could it have made to him whether the revenue stamps upon the deeds were sufficient or not, or any revenue stamps were on them at all? It did not enlarge his rights by not being there, nor lessen them by being there, *nor vice versa*. If their not being on would have

rendered the deeds void, that would not have authorized Dowell to sequester the lands; nor their being on, and cancelled with due formality, have prevented him from obtaining the relief sought. No deformity of the deeds could affect the merits of the controversy between Dowell and the Applegates. The *gravamen* of the suit was the alleged fraudulent transfer of lands, and consequent effect upon Dowell's rights; and the allegation of fraud upon the revenue laws of the United States, by not affixing sufficient revenue stamps upon the deeds, was a flimsy pretext for bringing a suit in the United States court, or for transferring it to that court from the State court. It would have been more honest to have brought it there, or have transferred it there, as a matter of course, and just as legitimate. It was a fraud upon a law, adopted as a part of the system of our Government, and such practices should be discountenanced.

As I view the matter personally, the said decree of the United States court has not a prop of inherent support upon which to stand; that, in fact, it was *coram non judice*. Such decrees, however, possess an immunity from collateral attack, which public policy requires to be maintained. The court that rendered it, although a creature of statute, having only defined powers, stands upon the footing of a court of superior jurisdiction; and, if the record were silent as to its having acquired jurisdiction in the case, it would readily be presumed that it had jurisdiction. When jurisdiction is assumed by a court of superior jurisdiction, it will be presumed, in a collateral proceeding, that it exercised it rightfully. Nor can such presumption be overcame by proof *dehors* the record. The only mode in which its jurisdiction can be questioned, in such a case, is by appeal or writ of error. But the difficulty here is that the record is not silent as to the existence of the conditions necessary to confer jurisdiction upon the court. It speaks; says the parties were all citizens of the State of Oregon, and that the subject-matter of the suit was an affair purely of local concern. It shows some facts, it is true, from which it might be inferred that the United States was defrauded

of revenue, and which are connected with the transactions complained of, but they evidently had no bearing on the case—could not possibly affect the merits of it.

I feel that the decree ought to be sustained, if it can be consistently with the principles of law, but it certainly has a shaky foundation upon which to stand. It is an unfortunate circumstance, as I regard it, that the United States court attempted to take jurisdiction of the case. It is highly important that the line of demarkation betwoen State and Federal jurisdiction be strictly observed. A stride across the boundary, from either side, necessarily must result perniciously, and prudence dictates that it is far better to yield disputed ground than occasion a collision."

II.

The plaintiff in this cause was not estopped from setting up his title to the land in controversy, acquired by a duly executed and recorded deed, and for a sufficient consideration, prior to the commencement of the suit tried in the United States Circuit Court, although made defendant therein as to other conveyances, the bill in that suit containing no allegations concerning his deed or title acquired thereunder to the land in controversy in this suit.

In Bigelow on Estoppel (Fifth Edition, 188), the doctrine of estoppel by a former judgment is stated as follows:

"One who brings an action upon one demand or several connected demands and attempts to support his whole case will assuredly be barred by the judgment from suing again for the *same* demand or any one or all of the connected demands; and he will find no escape from the estoppel by offering to show that other evidence existed, now for the first time at hand, which would have pro-

duced a different result. But facts not produced or in issue in the first action, whether then at hand or not, may be used in another suit upon a *different* demand, though that demand be of the same nature and grow out of the same transactien as the one first sued upon. *A man may acquire different rights at the same time and by ths same transaction, and, if his title is disputad to one of them in one suit, not make use of facts which would establish his title, without being precluded thereby from availing himself of such facts in a subsequent suit of the same sort touching his title to another of those things; though it would be otherwise if the facts were put in issue in the first suit.*"

In Cromwell *vs* The County of Sac. (94 U. S. Rep., 351), Justice Field, in delivering the opinion of this court, said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppal against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceed-

ings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppal of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in in another action."

And after citing authorities, added:

"These cases, usually cited in support of the doctrine that the determination of a question strictly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, *negative the proposition that the estoppal can extend beyond the point actually litigated and determined.*"

In Bissell *vs.* Spring Valley Township (124 U. S. Rep., 231), Mr. Justice Field, delivering the opinion of this court, said:

"In Cromwell *vs.* County of Sac. (94 U. S., 351), we drew a distinction between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon

the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or demand. In the latter case, which is the one now before us, we held following numerous decisions to that effect, *that the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.* The inquiry in such case, therefore, we said, must always be as to the point or question actually litigated and determined in the original action, for only upon such matters is the judgment conclusive in another action between the parties upon a different demand." (Lumber Co. *vs.* Buchtel, 101 U. S., 638; Wilson's Executor *vs.* Deen, 121 U. S., 525.)

In Glenn *vs.* Savage (14 Oregon, 567), it was held that to constitute a bar to further litigation concerning the same matter by parties in privies, "The matter adjudicated * * * must be a fact in issue by the pleadings, as distinguished from a fact in controversy."

Judge Strahan, delivering the opinion of the court in the case, said:

"There is no dispute as to the principle of law, that an issue once determined in a court of competent jurisdiction cannot be again litigated, and may be opposed as an effectual bar to any further litigation of the same matter by parties and privies. The contention is as to its correct application. A very brief examination of some of the authorities will illustrate the force and extent of the principle as well as the matter in which it has been applied."

In Caperton *vs.* Schmidt (26 Cal., 479), it is said:

"It will be seen from the rule, as here stated, that the matter adjudicated, to become as plea, a bar, or as evidence conclusive, must have been *directly* in issue, *and not* merely *collaterally litigated.* It must be a fact immediately found

according to the pleadings—not that on which the verdict was merely based—*a fact in issue as distinct from a fact in controversy.* (Porter *vs.* Baker, 19 N. H., 166; McDonald *vs.* B. R. W. & M. Co., 15 Cal., 148.) And what constitutes a fact in issue, as distinct from a fact in controversy, is well illustrated in the case of King *vs.* Chase (15 N. H., 15–17; Betts *vs.* Starr, 5 Conn., 552.")

So in County of Keokuk *vs.* Alexander (21 Iowa, 377), it is said:

"If, as a matter of fact, these items of account were specially identified and embraced in the cause of action of a former suit, and for some reason, although known to exist, were overlooked and not considered, they cannot in law be the ground of a second action."

So it it is said in Garwood *vs.* Garwood (29 Cal., 514):

"The judgment of a court having jurisdiction directly upon the point in controversy is as a plea at bar, and as evidence competent and conclusive between the same parties and their privies. A fact or matter at issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings."

In Foye *vs.* Patch (132 Mass. R., 105), Judge Field, delivering the opinion of the Supreme Judicial Court concerning estoppal by judgment, said:

"But when the second action between the same parties is upon a different cause of action from the first, then the judgment in the former action is conclusive only upon those issues which were actually tried and determined."

In Withers' Adm'r *et al. vs.* Sims *et al.* (80 Va. Rep.) it was held that "all matters presented and received or presentable to sustain the particular demand litigated in prior suit, and all matters presented or presentable under

the issue to defeat such demand are concluded by the judgment or decree in the former suit."

Judge Hinton, delivering the opinion of the court, said:

"Upon the point of what constitutes *res adjudicata* the authorities are not in entire harmony. A few of them, however, will be cited, simply with a view of illustrating the essential features of the doctrine, so far as we deem them applicable to the case in hand."

In Russell *vs.* Place (94 U. S. R., 608) Mr. Justice Field, in delivering the opinion of the court, says:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. *But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention* unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

And, says he:

"To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

He further says in that case:

"That in the Packet Company *vs.* Sickles (5 Wall., 580), the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same

parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: that to render the judgment conclusive it must appear by the record of the prior suit *that the particular matter sought to be concluded was necessarily tried or determined*, that is, that the verdict could not have been rendered without deciding that matter, or it must be shown by extrinsic evidence consistent with the record that the verdict and judgment necessarily involved the consideration and determination of the matter."

In Chrisman's adm'x *vs.* Harman *et al.* (29 Gratt., 499) the rule as stated in Russell *vs.* Place, supra, is quoted with approval. (Wells on Res Adjudicata, § 282; Freeman on Judgments, § 256.)

In Gardner *vs.* Raisbeck (28 N. J. Eq. Rep., 71), it was held that—

"A plea of former action, depending for the same matter, will not be good unless the former action was of the same nature and effect as the latter."

In McNutt *vs.* Trogden (29 West Va. Rep., 469), it was held by the Supreme Court of that State:

"Where the same person has two separate and distinct rights or interests in the subject-matter of a suit, and the allegations of the bill comprehend but one of said rights or interests, *the fact that such person is made a party to such suit will not estop, conclude or prevent him from asserting or defending his rights or interests in regard to said subject-matter, so far as they are not involved or comprehended in the allegations of the bill in such suit.* As to the matters not so comprehended in the bill he will not be regarded as a party to the suit."

In delivering the opinion of the court, Judge Snyder said:

"Where a person is properly made a defendant to a bill, he is bound to respond to all the allegations of the bill, and he will be *concluded as to all the matters affecting him which are necessarily involved in the suit whether he answers or not. But he is not required to do more than respond to the allegations of the bill. He is not bound to go further and bring in matters not mentioned in the bill and not necessary for his defense* He may be interested in the subject-matter of the suit in more than one capacity, and if the bill charges him in one capacity only he cannot be concluded in any other capacity simply because he failed to ascertain his rights in such other capacity. *Any interests he may have, which are neither directly nor indirectly alleged or referred to in the bill, will remain unaffected by the suit.* If the bill is taken for confessed, the only matters that can be so taken are those alleged in the bill."

In Griffin *et al. vs.* Wallace *et al.*, (66 Ind., 410), Judge Perkins, delivering the opinion of the court, stated the rule concerning the effect of a former judgment as follows:

"The rule that every question which might havo been decided or litigated in a cause, will be presumed to have been decided, means that everything which was within the issues in the cause, and might have been proved under them, will be presumed to have been proved and adjudicated upon. *But what was not embraced by the issues made, though issues broad enough to embrace such matter might have been made, will not at least be conclusively presumed to have been determined.* The Lessee of Lore *vs.* Truman, 10 Ohio State, 45; Babcock & Co. *vs.* Camp, 12 O. S., 11; Louw *vs.* Davis, 13 Johns., 227; Gould *vs.* Evansville. etc., R. R. Co. 1 Otto, 526; Byrket *vs.* The State, 3 Ind., 248, and note; The State *vs.* Brutch., 12 Ind., 381; Bright *vs.* Coffman, 15 Ind., 371, on p. 373; Phillips *vs.* Berick, 16 Johns., 136. The Indianapolis, etc., R. R. Co. *vs.* Clark, 21 Ind., 150, is in point, and so is Bougher *vs.* Scobey, 21 Ind', 365. See Jenkins *vs.* Parkhill, 25 Ind., 473; 2 Chitty Plead., 16th Am. Ed., 421.

"It was upon this very ground that Boardman *vs.* Griffin, 52 Ind., 101, was decided. The court said:

'When the trial of a cause is by the court, instead of a jury, whether the court is required to find the facts specially or not, it cannot, any more than a jury can, go outside of the case made by the pleadings. In such cases, as well as in others, the parties must recover upon the allegations of the pleadings. They must recover *secundum allegata et probata*, or not at all. It must be so in the nature of things, so long as our mode of administering justice prevails.'"

See also The Town of Cicero *vs.* Clifford, 53 Ind., 191; The Fishback, etc., G. R. Co. *vs.* Wilson, 31 Ind., 371.

In Parnell *vs.* Hahn, (61 Cal., 131), it was held that—

"A judgment is conclusive on all questions involved in the action upon which it depends, and upon matters which, *under the issues*, might have been litigated and decided in the case."

See also Waterman *vs.* Morrill, 72 Cal, 48.

In Adams *vs.* Adams, (25 Minn., 72), Judge Cornell, in delivering the opinion of the court, said:

"The question before us for adjudication, then, is *whether the defendant here is precluded by this former judgment from litigating in this action, a question which was not raised by the pleadings in that action, and hence was not directly passed upon nor determined*, because the note there sued on originated in the same illegal transaction as the one now in suit, and a recovery thereon might have been defeated if the defence which is here set up had been there properly interposed. As respects the particular note or demand upon which the recovery was had in that action, the judgment which was there rendered is a finality and conclusive of the rights of the parties thereto, and their

privies, not only as to every matter and defence which was actually presented and litigated therein, but as to every possible defence or matter that might have been presented for adjudication. So far as that note is concerned, the litigation is forever closed, and the rights of the respective parties in respect thereto have have become finally fixed and determined. Allis *vs.* Davidson, 23 Minn., 442; Thompson *vs.* Myrick, 24 Minn., 4. The operative effect, however, of a judgment, as a bar or estoppel in another action between the same parties upon another of said notes not directly involved or passed upon in the former action, though resting upon the same illegal consideration, is limited to the precise points which were then actually controverted, and to the matters which were embraced in the issues there tendered, upon the determination of which such judgment was rendered. Dixon *vs.* Merritt, 21 Minn., 196; Cromwell *vs.* County of Sac., 94 U. S., 351; Davis *vs.* Brown, 94 U. S., 423."

In Aurora City *vs.* West (7 Wall., 82), it was held:

"The plea of *res judicata* applies to every objection urged in a second suit, when the same objection was open to the party *within the legitimate scope of the pleadings in a former one, and might have been presented in it.*"

In Seccor and others *vs.* Sturgis and others (16 N. Y., 548), it was held that:

"The distinction between demands or rights of action which are single and entire and those which are several and distinct is that the former immediately arise out of one and the same act or contract, and the latter out of different acts and contracts."

In Burlen *vs.* Shannon (99 Mass. Rep., 200) it was held:

"A verdict and judgment are conclusive by way of estoppel *only* as to facts, without the existence and proof or admission of which they could not have been rendered."

Considering the question of the effect of the judgment of the United States Circuit Court Judge Thayor, delivering the opinion of the Supreme Court of Oregon in this cause (Applegate *vs.* Dowell, 15 Or. 503), said:

"From these various facts we have to determine the *status* of the title to the 40 acres of land in dispute. The suit herein was commenced on the seventeenth day of August, 1886, and when the appellant introduced his deed from said William H. H. Applegate in evidence at the hearing he made out under the issues in the suit a *prima facie* case. At that stage of the proceeding he was presumably entitled to the relief claimed. He was in possession of the land under an absolute deed of title, which had been executed to him, and recorded in the office of the clerk of the county in which the land is situated more than eleven years, and the respondent was claiming it adversely to him. In order to defeat such recovery it devolved upon the respondent to prove that appellant had acquired no title to the land, or that he had aliened it, or in some legal manner had been divested of it, and for that purpose the respondent introduced in evidence the said decree of the said United States Court and other proceedings connected therewith. Whether that evidence was effectual for the purpose depends upon the two questions already alluded to, viz.: *First*, whether the said decree operated upon or affected the appellant's title derived under the deed from William H. H. Applegate of October 8, 1874; and, *second*, whether the said United States Court had jurisdiction of the suit in which the said decree was rendered.

"It is very difficult to determine from the *data* before us when or how Jesse Applegate disposed of or attempted to dispose of the 40 acres of land in question. It is alleged in said bill that he and his wife deeded to said William

H. H. Applegate 160 acres of the north half of the said donation claim by deed dated April 6, 1867; also 80 acres of said donation claim by deed dated April 19, 1869. These two parcels constitute all the land shown by the said bill to have been conveyed to said William H. H. Applegate. It is not stated in the bill in which half of the claim the said 80 acres are situated, but as said William H. H. Applegate deeded 200 acres in the north half of the claim to the Drains and the 40 acres, also in said half of the claim, to the appellant, which corresponded in acreage to the 160 acre parcel and the 80 acre parcel, it is evident that the latter parcel is situated in said north half also, and that the said 40 acres must have been deeded by Jesse Applegate and wife to William H. H. Applegate by one of the said deeds referred to. Nor is this view inconsistent with the inferential statement in the decree that Jesse Applegate conveyed said 121.55 acres to his sons, William H. H. Applegate and Daniel W. Applegate, by deed dated April 16 and 20, 1869. It will not be presumed that Daniel W. Applegate purchased of William H. H. Applegate land and paid him the full value therefor, which he already had a deed to from the latter's grantor. The decree, then, only operated upon the conveyance from Jesse Applegate to William H. H. Applegate long after the latter had conveyed the land to the appellant, and whether that affected the title in the appellant's hands is the question for determination. The deed to William H. H. Applegate was not void, conceding it to have been a conveyance made with intent to hinder, delay, or defraud creditors, although the statute declares that such conveyances shall be void. It was good as between the parties and as to every one except creditors, and they can only treat it as void in a proceeding to collect their debts. A sale of the property to a *bona fide* purchaser for value will cut off their claim and pass a good title. (Section 409, note 1, Wait Fraud. Conv.; section 445, *Id.*)

"It was claimed on the argument by the respondent's counsel that it was the duty of the appellant to have interposed a plea in the suit in the United States Court that he was such a purchaser if he claims to have been such,

and that his failure to do so estops him from setting up any claim of title to the land. The suit in the United States Court was in the nature of a creditor's bill. Its object was to subject certain property Jessse Applegate had conveyed to his children to the payment of a debt he was owing to the respondent. It was to ascertain the intent of said Applegate in making the conveyances, and, if found to be fraudulent, to direct a sale of the property, and application of the proceeds to the payment of the debt. The conveyances were to the several parties, and were separate transactions in the main, though probably not to such an extent as to require separate suits to be brought against each. The bill, under the rule laid down in Fellows *vs* Fellows (4 Cow., 682), may not have been objectionable upon the ground of multifariousness, and yet the appellant was not required to answer any matter charged against any of the other defendants in the suit, and there was no charge against him regarding the purchase of the said 40 acres of land. The said Jesse Applegate was charged in the bill with having conveyed it, with other lands, to said William H. H. Applegate, with intent to delay, etc., his creditors, and the latter was charged with having accepted the conveyance under circumstances that might cast suspicion upon his good faith in the affair. The difficulty in the case arises from the fact that the complainant in the bill treated the land as being held by said William H. H. Applegate under a deed from said Jesse Applegate, and only sought to have that deed annulled, when in fact the former had, long prior thereto, conveyed the land for an adequate consideration to appellant by a deed that at the time of the filing of the bill had been standing upon the records of Douglas County for nearly 11 years, and the appellant was probably in possession of the land at that time.

Was the latter, then, bound by the decree? He might have been, possibly, if the conveyance to him had been a secret one, and he would not, unquestionably, if he had not been made a party to the suit. But was he a party to the suit for the purpose of affecting the transaction of his purchasing the land from his brother in 1874? All

the defendants in the bill were made parties, in order to prevent a multiplicity of suits. As between them, respectively, and the complainant, except as to some common matter, if there were any such, the suit might be regarded, it seems to me, the same as though it had been brought against them separately. The complainant could have had the sale from William H. H. Applegate to the appellant inquired into the same as he did the sale from the former Drains. He could have charged the parties with bad faith in the affair, and, if it had been sustained, have been relieved from its effect; but he did not seek to do that. He contented himself with impeaching the deed from Jesse Applegate to William H. H. Applegate, and left the other in *statu quo*. It was his duty to ascertain whether or not William H. H. Applegate had conveyed away the land; and, if so, have had the transaction inquired into, if he desired to question it. As the appellant's counsel very pithily expresses it, in his brief, "it was Dowell's business to see that the holder of the legal title was sued, and not the business of the holder of the legal title to see that Dowell sued the proper person."

The decree itself only binds the parties to the suit and concludes them no further than the issue determined therein. It does not bind them as to matters which were not in issue in the case. If the validity of the said deed from William H. H. Applegate to appellant had been made an issue in the suit, the decree would have been conclusive upon the question, but it would have had to be directly in issue, and not merely collaterally litigated. "It must be a fact immediately found, according to the pleadings; not that on which the verdict was merely based—*a fact in issue, as distinct from a fact in controversy.*" Glenn *vs.* Savage, (14 Or., 573; 13 Pac. Rep., 442.) The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different clause of action, is often overlooked. And it is from that circumstance that attorneys and

courts have frequently been misled by the rule laid down in Le Guen *vs.* Gouverneur, (1 Johns. Cas., 496,) to the effect that the judgment of a court of competent jurisdiction is not only conclusive as to all questions actually decided, but as to all which the parties might have litigated and had decided therein. Judge Field, in Cromwell *vs.* County of Sac. (94 U. S., 351) has pointed out the distinctions referred to with his accustomed clearness and accuracy. It amounts simply to this: That if the second action is upon the same claim the former judgment, if upon the merits, will constitute a complete bar, not only as to every matter that was brought in to defeat the claim in the former action, but as to every other matter that would have been admissible for that purpose. If, however, the second action is upon a different claim, the former judgment will only operate as an estoppal against the matters actually litigated therein. In that case it concludes only those facts that were directly in issue in that action. The inquiry in the latter case, Judge Field says, "must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." The case here clearly belongs to the latter class, and the decree in the United States Court, conceding its validity, does not conclude the appellant from asserting title to the 40 acres of land in controversy."

The validity of the of the decree of the United States Circuit Court was again considered by the Supreme Court of Oregon; in Dowell *et al. vs.* Applegate *et al.*, decided July 31, 1893. (33 *Pacific Reporter*, 937.)

The case was a suit brought by Dowell *et al.* to quiet title to lands purchased at the sale under the decree. The decree was held to be void. The opinion of the court is as follows:

Per Curiam. This is a suit to quiet title to certain real estate in Douglas county, formerly belonging to Jesse Applegate. Passing without notice all preliminary and incidental questions, and coming directly to the merits, it appears:

1. That the title to the 46 acre tract of land under which plaintiffs' now claim was in controversy between the same parties in the case of Applegate *vs.* Dowell, reported in 15 Or. 513, 16 Pac. Rep. 651, and 17 Or. 299, 20 Pac. Rep. 429, and was there adjudged to belong to the defendants; and the question is therefore *res adjudicata* in this case.

2. Plaintiff's title to the remainder of the land depends upon a validity of a decree of the United States circuit court for the district of Oregon, rendered in a suit of B. F. Dowell *vs.* Jesse Applegate *et al.*, brought to set aside certain conveyances for fraud. From the record of that case in evidence it affirmatively appears to have been a controversy wholly between citizens of this State, and involving no question arising under the laws of the United States, and therefore, in our opinion, the court was without jurisdiction; and the decree is void. It follows that the decree of the court below must be affirmed.

J. N. DOLPH,
Attorney for Defendant in Error.